INDEX

Page

In the United States District Court
Middle District of Tennessee
Nashville Division

Archie Nathaniel Biggers,
Petitioner,

vs.

Lake F. Russell, Warden,
Tennessee State Penitentiary,
Respondent.

} Civil Action No. 5120

Relevant Docket Entries ..... A. 3
Order, July 1, 1968 ..... A. 5
Petition for a Writ of Habeas Corpus and for Leave to Proceed in Forma Pauperis, July 1, 1968 ..... A. 6
Motion to Dismiss, August 6, 1968 ..... A. 17
Order, May 12, 1969 ..... A. 19
Answer, May 28, 1969 ..... A. 21
Affidavit of Avon N. Williams, Jr., June 17, 1969 A. 24
Affidavit of Mrs. Flora Marie Hammonds, June 17, 1969 ..... A. 26
Affidavit of Archie Nathaniel Biggers, June 17, 1969 ..... A. 29
Order, July 19, 1969 ..... A. 31
Order, April 17, 1970 ..... A. 32
Motion to Reconsider, April 24, 1970 ..... A. 44
Order, May 4, 1970 ..... A. 45
Notice of Appeal, May 11, 1970 ..... A. 52

INDEX (Continued)

	Page
TRANSCRIPT OF PROCEEDINGS	
Appearances	A. 54
Index	A. 54
Proceedings—Opening Statement of Petitioner	A. 55
Opening Statement of Respondent	A. 62
Testimony of William A. McDaniel, Jr.—	
Direct Examination	A. 66
Cross-Examination	A. 77
Redirect Examination	A. 83
Testimony of Dr. Irwin Pollack—	
Direct Examination	A. 89
Cross-Examination	A. 101
Redirect Examination	A. 118
Testimony of Flora Marie Hammonds—	
Direct Examination	A. 119
Cross-Examination	A. 121
Testimony of Margaret Frances Beamer—	
Direct Examination	A. 122
Cross-Examination	A. 128
Testimony of Floyd Bailey—	
Direct Examination	A. 132
Cross-Examination	A. 134
Curriculum Vita, Irwin Pollack	A. 137

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, WARDEN,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1971
CERTIORARI GRANTED FEBRUARY 28, 1971

Introductory Statement

May it Please the Court:

By Order of February 28, 1971, this Court granted the motion of Petitioner to use the record in No. 237, October Term, 1967. That record may be found in Volume 51, Transcripts of Records and File Copies of Briefs, Nos. 232-237, Supreme Court of the United States, October Term, 1967, in the library of the United States Supreme Court.

The transcript of the record used in 1967 together with the file copies of the briefs found in said Volume 51 is complete with the exception of the transcript of oral argument when this case was heard January 15, 1968. That oral argument has been transcribed and filed in this cause as Appendix J (found in "Motion for Leave to Supplement Appendix to Petition for Writ of Certiorari") (in blue cover.)

Also a part of the record in No. 237, October Term, 1967, was the order of this Court granting certiorari (Appendix H at page A67 in the petition for certiorari), per curiam opinion affirming the judgment below (Appendix G in the petition for certiorari, at A61) and the order of this Court denying a petition to rehear (Appendix F to the petition for certiorari, at A60).

This Appendix contains all the relevant items, opinions and judgments except as above stated and except the opinion of the United States Court of Appeals for the Sixth Circuit which is found in the appendix to the petition for writ of certiorari as Appendix A at pages A1-A38. *

---

* The Sixth Circuit Opinion (Appendix A) and the transcript of oral argument in 1968 (Appendix J) (in blue cover), have not been reprinted in this single appendix in accordance with the Clerk's memorandum to counsel which advises that these need not be reprinted where they were previously included in a printed petition for certiorari.

In The

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

LAKE F. RUSSELL, Warden
Tennessee State Penitentiary
Nashville, Tennessee,
Respondent.

Civil Action No. 5120

RELEVANT DOCKET ENTRIES

July 1, 1968 Order entered by Judge William E. Miller directing Clerk to file petition for writ of habeas corpus in forma pauperis; Copy to be served on the Attorney General, State of Tennessee; Respondent to file his answer within the time allowed by law; respondent will submit affidavits in support of his position, and petitioner shall have 15 days thereafter to file his own affidavit in support of the allegations in his petition and to propound written interrogatories to the respondent's affiants. After the affidavits and interrogatories have been filed, the Court will determine what further action is required.

August 6, 1968 Motion to Dismiss filed by

defendant, with Exhibits A & B. Certificate of service attached.

May 12, 1969 Order Entered: Respondent's Motion to Dismiss is denied; Evidentiary Hearing required to determine factual issues; Clerk to set hearing; Merits of Petitioner's contentions will be deferred until after hearing (Att. copy to Petitioner, to Hon. Avon Williams and Hon. James C. Dale).

May 28, 1969 Filed: ANSWER of Respondent, c/s attached.

June 9, 1969 Filed: Brief of Petitioner, c/s attached.

June 17, 1969 Filed: Affidavit of Avon N. Williams, Jr. on behalf of plaintiff.

June 17, 1969 Filed: Affidavit of Mrs. Marie Hammons - on behalf of plaintiff.

June 17, 1969 Filed: Affidavit of Archie Nathaniel Biggers, Petitioner.

July 29, 1969 Order Entered: Evidentiary hearing - confined to issues set forth in order - to be set by Clerk. Attested copy to attorneys of record and to petitioner, Archie Nathaniel Biggers.

April 17, 1970 Order entered granting petition for writ of habeas corpus, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge. Copy to attorneys of record and to the petitioner.

April 24, 1970 Motion to reconsider filed by respondent, with brief in support thereof. Certificate of service attached.

May 4, 1970 Order entered denying respondent's motion to rehear. Copy to attorneys of record.

May 11, 1970 Filed: Respondent's Notice of Appeal from Order entered April 17. Att. copy mailed to attorneys for Petitioner, Avon N. Williams and Nichael Meltsner.

In The United States District Court
Middle District of Tennessee, Nashville Division

[Title Omitted in Printing]

ORDER

(Received for Entry 2:30 P.M., July 1, 1968)

The Clerk is directed to file in forma pauperis the petition of Archie Nathaniel Biggers for writ of habeas corpus.

A copy of the petition and order will be forwarded to the Attorney General, State of Tennessee, Nashville.

The Respondent is directed to file his answer within the time allowed by law to show cause why the writ of habeas corpus should not issue. Respondent will submit affidavits in support of his position on all factual issues, and Petitioner shall have fifteen days thereafter to file his own affidavit in support of the allegations in his petition and to propound written interrogatories to the Respondent's affiants, or to file answering affidavits of other affiants. After such affidavits and any interrogatories have been filed with the Clerk, the Court will determine what further action is required.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

PETITION FOR A WRIT OF HABEAS CORPUS AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(Filed July 1, 1968)

TO: The Honorable William E. Miller
United States District Judge

I (Jurisdiction)

This is an application for a writ of habeas corpus to relieve the petitioner of restraint under a conviction imposed upon him by the State of Tennessee in violation of the Constitution of the United States. A United States District Court is authorized to entertain the application by 28 U.S.C. §2241(a) (1964).

II (Petitioner)

(A) Petitioner is a citizen of the United States and is a resident of the State of Tennessee. He is a pauper and because of his poverty, he is unable to pay the
[fol. 2] cost of this action and is unable to give security for same. Petitioner is currently imprisoned at the Tennessee State Penitentiary.

(B) Petitioner, a Negro, was found guilty of rape and sentenced to twenty years in prison in the Criminal Court of Davidson County, Tennessee on December 3, 1965. His conviction and sentence were affirmed by the Tennessee Supreme Court on January 12, 1967, 411 S.W.2d 696. Petition for rehearing was denied on March 1, 1967. A petition for a writ of certiorari in the Supreme Court of the United States was granted and the judgment affirmed

by an equally divided court, ... U.S. ..., 19 L. Ed. 2d 1267, 88 S. Ct., on March 18, 1968. A petition for rehearing was denied April 22, 1968.

III (Respondent)

The respondent in this action is Lake F. Russell, Warden of the Tennessee State Penitentiary, who has custody of petitioner.

IV (Circumstances of the Offense, Arrest, Identification, and Trial)

(A) On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor. Mrs. Beamer's attention was drawn to the attacker's knife and she was in fear for her life.

(B) Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway. She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom. The intruder then took Mrs. Beamer out of the house through an unlit kitchen up a railroad embank-
[fol. 3] ment to a nearby patch of woods there he raped her. The events surrounding the crime lasted from 10 to a maximum of 30 minutes.

(C) During the following seven months, the police requested Mrs. Beamer to look at police photographs on several occasions and although she identified the picture of one man who was not petitioner as "having features" like the rapist, the case lay dormant.

(D) During the evening of August 16, 1965 petitioner, a 16-year old Negro male, with no criminal record, was receiving medical treatment at Hubbard Hospital in Nashville, Tennessee where he had gone with his mother. They were accosted by a police officer who mentioned that a woman (Mrs. Silverman) had been assaulted in the Bordeaux area of Nashville, and sought to take Biggers to her home for attempted identification. On the officer's promise to return petitioner home immediately thereafter, his mother reluctantly agreed. The officer then took petitioner to Mrs. Silverman's home where she attempted to but could not identify him.

(E) Instead of taking petitioner home, the officer then took him to the Juvenile Court Building where he was kept outside in the car and questioned by officers for some time. Thereafter the officers charged him with the offense of loitering, took him into the Juvenile Court Building, and left him there with the night attendant. By this time it was dawn. He slept there until morning, when the police picked him up and took him to the Metropolitan Jail. There they questioned him about two hours, then put him in a cell.

(F) In the afternoon of August 17, petitioner was brought into the presence of Mrs. Margaret Beamer who identified him as the person that had raped her seven months earlier. Petitioner's mother and counsel retained by his mother after his arrest were not notified of or present
[fol. 4] at the identification proceeding. The circumstances of the identification were as follows:

(G) On August 17th the police went to Mrs. Beamer's home and brought her to the police station, telling her that they wanted her to "look at a suspect" in one of the rooms in the detective division. The police brought petitioner into the adjoining hall and then to the doorway of the room

in which Mrs. Beamer was seated. Mrs. Beamer was shown petitioner in the doorway in the presence of at least five policemen. Although a lineup could easily have been assembled, petitioner was presented as the only suspect. Mrs. Beamer asked the police to have petitioner speak, and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut-up, or I'll kill you." Only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her.

(H) An August 17th edition of the Nashville *Tennessean*, carried a front page story of the Silverman assault and petitioner's arrest. Although not named, petitioner was described therein as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of petitioner entering jail and stated that he had confessed to attacking Mrs. Silverman; that Mrs. Margaret Beamer had identified him as her attacker, and that two other attempted rape victims could not identify him.

(I) At petitioner's trial the state initiated reference to newspapers accounts of petitioner's arrest in order to establish that Mrs. Beamer had identified petitioner before his photograph appeared on August 18th. The trial record does not show whether Mrs. Beamer had seen the first story in the Tennessean published on the [fol. 5] morning of the 17th. On information and belief, she saw that story.

(J) Petitioner was indicted for the rape of Mrs. Beamer on October 1, 1965 and tried two months later. At trial,

the only evidence connecting him with the rape was Mrs. Beamer's identification. Her thirteen-year old daughter testified to what she saw but was unable to identify petitioner as the rapist.

(K) On direct examination four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station. Petitioner's counsel objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled.[1]

(L) Petitioner testified in his own behalf and denied that he committed the act charged. He also told the jury that the police directed him to speak the words of the rapist and that Mrs. Beamer did not identify him until after he had spoken. Petitioner's mother, stepfather, and seven friends and neighbors testified that petitioner was an obedient and truthful young man of good reputation who had never before been in "trouble."

(M) In his summation, the prosecuting attorney characterized the issue in the case as one of identification. He repeated Mrs. Beamer's identification testimony and related a story concerning a case that he had tried, the point of which was that violence and terror result in accurate identification:

[fol. 6] In many parts of our United States, Gentlemen of the Jury, a case of this nature would

[1] Mr. Williams: ——that it is immaterial, —that I objected to on the other—it is immaterial and incompetent. She has already testified with regard to how identification —and that identification has to be weighed by the Jury on the basis of what she has testified, not on the basis of what—of this happened—a test to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary, Your Honor.

> never go to trial, and I'm sorry to say, it's all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she's not considered in those states to have any more rights than a dog and her reproductive organs —.

On the basis of Mrs. Beamer's identification the only evidence linking petitioner to the rape, the jury found Archie Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years.[2]

(N) The trial of the case began on November 29, 1965 and ended December 3, 1965. The selection of a jury entailed a voir dire of well over one hundred veniremen, and a special venire of one hundred-eleven prospective jurors had to be subpoenaed by the Court for December 1, 1965 in order to complete the selection of the jury. The majority of the veniremen admitted on voir dire that they had read newspaper reports about the arrest of petitioner on several charges of rape in the Fall of 1965. Some of those seated on the jury which tried the case admitted that they had read such news stories.

(O) At the time of trial petitioner had no real estate or other valuable property, and was unemployed, having been confined to jail since his arrest on August 17, 1965. His mother, Mrs. Flora Marie Hammons, likewise had and has no valuable property, and is and has been for many years a domestic servant earning approximately $37.50 per week. Petitioner has no father, having been born out of wedlock.

---

[2] Although petitioner was originally sentenced to an institution for youthful offenders, he has been placed in the Tennessee State prison, a facility for adults.

(P) These facts relating to the indigency of Biggers were stated, in substance, to the trial judge upon the hearing of the motion for new trial in the case and also upon the hearing of a post-trial motion seeking a reconsideration of the trial court's action in denying a state-furnished transcript of the evidence. [fol. 7] The voir dire examination of prospective jurors alone would have required several hundred pages to be transcribed. Petitioner and his mother were unable even to pay for a transcript of the evidence itself, so that petitioner's counsel was compelled to advance payment for a transcript of the evidence. Counsel were unable to advance the sum necessary for transcription of the extensive voir dire and were therefore obstructed in the preparation of the motion for new trial and the appeal in this case, and forced to forego presentation of all issues of state and federal constitutional law arising out of the selection of the jury.

V (First Claim)

By presenting petitioner for identification without a lineup and without notifying his parents or retained counsel, and by making him speak the words of the rapist in the absence of circumstances justifying such a procedure, the State violated his rights under the Due Process Clause of the Fourteenth Amendment. This "showup" method of procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification as shown, in part, by the following circumstances:

(1) Mrs. Beamer's identification of petitioner was uncorroborated.

(2) Her thirteen year old daughter was unable to identify petitioner.

[fol. 8] (3) Mrs. Beamer's opportunity to observe her assailant has been conceded by the State to have been "limited." She never saw him in direct light and could only observe him for from 10 to 30 minutes.

(4) Petitioner was described to Mrs. Beamer as a "suspect" by the police.

(5) He was compelled to speak the inflammatory words used by the rapist without opportunity being afforded for comparison.

(6) The gap between the crime and the identification was seven months.

(7) The State treated the jury in a manner which substantially impaired its capacity to appraise the identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case; the jury was selected from persons exposed to this comment; the jurors were reminded of the harmful stories by the prosecution or voir dire and at trial; police officers were permitted to testify again and again to the fact of identification although it was not controverted; finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as appealing to racial prejudice and which that Court found to be error, *albeit* non-reversible.

VI (Second Claim)

By compelling petitioner to speak the words used by the rapist and by introducing his speech as evidence of petitioner's guilt on direct examination, the State denied peti-

tioner's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

VII (Third Claim)

By admitting in evidence the identification of petitioner, obtained as a result of a pre-trial confrontation [fol. 9] held while petitioner was unlawfully arrested, the state violated rights guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution.

VIII (Fourth Claim)

By refusing to require the state to defray the costs of preparation of the transcript of evidence despite his plain indigency the state denied petitioner's rights under the Due Process Clause and Equal Protection Clause of the Constitution.

IX (Fifth Claim)

By affirming petitioner's conviction despite the inflammatory and prejudicial remarks of the prosecuting attorney in his summation to the jury suggesting that because prosecutrix was a Negro woman he would not have been brought to trial in states south of the State of Tennessee and relating her reproductive organs to those of a dog, Tennessee violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This argument was manifestly improper and calculated to unduly inflame and prejudice the jury and unduly motivate its conviction of defendant on bases other than evidence introduced in the case and on racial grounds.

X (Sixth Claim)

The totality of circumstances surrounding petitioners conviction especially, that there was absolutely no evidence connecting defendant with the offense except the insubstantial identification made by the prosecutrix and the prejudicial evidence to which the jury was exposed violated petitioner's right to a fair trial as protected by the Due Process Clause of the Fourteenth Amendment.

[fol. 10] XI

Petitioner has exhausted all available state remedies and no previous petition for writ of habeas corpus has been filed in this matter.

WHEREFORE, petitioner respectfully requests:

1) That a writ of habeas corpus be directed to respondent;

2) That respondent be required to appear and answer the allegations of this petition;

3) That petitioner be accorded an evidentiary hearing on the allegations of this petition;

4) That after a full and complete hearing petitioner be relieved of the unconstitutional conviction and sentence imposed upon him;

5) That petitioner be allowed such other, further and alternative relief as may seem just, equitable and proper under the circumstances;

6) That petitioner be allowed to file this petition without pre-payment of cost and that this proceeding be allowed *in forma pauperis*.

Dated: .....

Respectfully submitted,

AVON N. WILLIAMS
Charlotte at Fourth
Nashville, Tennessee

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for Petitioner

VERIFICATION

State of Tennessee)
) SS.
County of Davidson)

Archie Nathaniel Biggers being first duly sworn upon oath according to law, deposes and says that he has read the foregoing petition, and that he knows the contents thereof to be true except as to such matters as are stated upon information and belief and these he verily believes to be true and that he believes he is entitled to the relief sought therein.

/s/ Archie Nathaniel Biggers

Sworn to and subscribed before me this
18th day of June, 1968

/s/ Signature Illegible
Notary Public

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

MOTION TO DISMISS

(Filed August 6, 1968)

The petitioner was convicted in Davidson County for the offense of rape on December 3, 1965 and received a twenty (20) year sentence.

Certified copies of the technical record and bill of exceptions are attached hereto as Exhibits A and B respectively.

This judgment of conviction was duly appealed to the Tennessee Supreme Court and was confirmed by that Court in the reported decision of *Biggers v. State*, 219 Tenn. 553, 411 S.W.2d 696 (1967). The United States Supreme Court granted certiorari and affirmed by an equally divided court. *Biggers v. State of Tennessee*, 390 U.S. 404 (1968).

[fol. 2] The crux of the instant petition is that the petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights regarding the circumstances of his identification by the victim. This issue has been fully considered and decided adversely to the petitioner by both the Tennessee Supreme Court and the Supreme Court of the United States.

It is further submitted that the petitioner's last three contentions, under the facts and circumstances of the instant case, simply do not rise to the dignity of a denial of constitutional due process. For the foregoing reasons, the respondent respectfully moves that the petition for writ of habeas corpus filed in this case be dismissed and denied.

/s/ David W. McMackin
DAVID W. McMACKIN,
Assistant Attorney General,
Supreme Court Building,
Nashville, Tennessee.

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 4:15 P.M., May 12, 1969)

This action involves a motion by the respondent to dismiss the petition for writ of habeas corpus filed by Archie Nathaniel Biggers. The petitioner was convicted of rape in the Criminal Court of Davidson County, Tennessee, in 1965. The judgment was affirmed by the Supreme Court of Tennessee and then by an equally divided Supreme Court of the United States early in 1968. Biggers has now petitioned the Court for a hearing on his writ of habeas corpus, pursuant to 28 U.S.C. §2241.

Respondent maintains that the constitutional questions here raised by the petitioner have been fully considered and decided adversely to him by the United States Supreme Court. It is the position of the respondent that the Court should not, therefore, redetermine the same issues.

Though the present case has been argued before the Supreme Court, the decision of that Court is without force as precedent. When the Supreme Court is
[fol. 2] equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. Etting v. Bank of the United States, 24 U.S. 59 (1826). Had there been a more conclusive decision regarding the legal questions in the present case, the Court could easily decline any further review. There would be little reason for the Court to rehear arguments previously rejected by the highest judicial authority. But the Supreme Court did not settle the merits of this case, and affirmed only through an equal split in opinion. The Court therefore concludes that it is not precluded from hearing evi-

dence on the petitioner's allegations, and the respondent's motion to dismiss is hereby denied.

The Court being of the opinion that an evidentiary hearing is required to determine the factual issues in this cause, it is ORDERED that a hearing be set by the Clerk at the earliest time consonant with the Court Calendar. Any analysis of the merits of the petitioner's contentions will be deferred until after the evidentiary hearing.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ANSWER

(Filed May 28, 1969)

The Respondent, Lake F. Russell, Warden, Tennessee State Penitentiary, for answer to the Petition for a writ of habeas corpus, filed against him in the above cause, says:

I.

Respondent admits that he is the duly appointed and qualified warden of the Tennessee State Penitentiary at Nashville, Tennessee, and that Petitioner, Archie Nathaniel Biggers, is presently therein confined, having been convicted of the crime of rape in the Criminal Court of Davidson County, Tennessee, on December 3, 1965, and having been sentenced to a term of twenty (20) years in prison. Petitioner's conviction was affirmed by the Tennessee Supreme Court on January 12, 1967, the opinion of such Court appearing in 411 S.W.2d 696. Subsequent to the denial by the Tennessee Supreme Court of a Petition for rehearing, a Petition for a writ of certiorari was granted by the Supreme Court of the United States and the judgment of the Tennessee Supreme Court affirmed by an equally divided Court, 19 L. Ed. 2d 1267, on March 18, 1968, after which decision a Petition for rehearing was denied.

[fol. 2] II.

Respondent denies that any rights of Petitioner were violated by the procedures employed by the Metropolitan Police Department in presenting Petitioner, then a suspect, to the victim of his crime. Petitioner here seeks to attack

the sufficiency of the identification evidence, a matter not appropriate for inquiry on Petition for writ of habeas corpus.

III.

Respondent denies that Petitioner's privilege against self-incrimination was in any way violated by his being asked to speak the words used by the rapist, and Respondent further denies that "such speech" was introduced on direct examination with the exception of the victim's testifying as to the words that the rapist spoke.

IV.

Respondent denies that the refusal of the trial judge to require the State to defray the cost of preparation of the transcript of evidence in any way denied any right of Petitioner since a hearing was held and it was determined that Petitioner was not an indigent.

V.

Respondent denies that any right of Petitioner was violated by alleged inflammatory and prejudicial remarks made by the prosecuting attorney since such remarks were immediately objected to by defense counsel, the trial judge just as immediately sustained the objection, and the prosecuting attorney forthwith abandoned that line of comment.

VI.

Respondent denies that Petitioner was denied a fair trial and again would point out to the Court that [fol. 3] the entire thrust of the petition for habeas corpus filed herein is an attack upon the sufficiency of the evidence adduced at the trial of Petitioner.

VII.

Respondent admits that Petitioner has exhausted all available state remedies but submits to the Court that for the reasons stated in the motion to dismiss hereinbefore filed that the petition for writ of habeas corpus should be dismissed.

Respondent further denies generally all things not hereinbefore specifically denied and having fully answered asks the Court to dismiss the petition for habeas corpus and to require the Petitioner to complete the service of his time.

/s/ James C. Dale, III
James C. Dale, III
Special Counsel
State of Tennessee
709 Nashville Bank & Trust Bldg.
Nashville, Tennessee 37201

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF AVON N. WILLIAMS, JR.

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Avon N. Williams, Jr., after being duly sworn according to law, deposes and says:

That deponent is one of the counsel of record for the petitioner, Archie Nathaniel Biggers, in the above case and is a member of the Bar of the State of Massachusetts and Tennessee, the United States District Courts for the Eastern, Middle and Western Districts of Tennessee, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States, and has been practicing lawyer in the State of Tennessee since 1948. That the document attached hereto marked Exhibit "A" is a true and correct copy of the transcript of the record in the above case filed in the Supreme Court of the United States during its October Term, 1967, as Case No. 237 on Writ of Certiorari to the Supreme Court of Tennessee, Middle Division, and that said transcript of the record contains a true and correct transcript of the record of trial in the above case before the Criminal Court of Davidson County, Tennessee, Division I, and of the proceedings on appeal in the Supreme Court of Tennessee. That the deponent has examined the petitioner's personnel record in the Juvenile Court of Davidson County, Tennessee, and that the said record shows he was arrested at 5:25 A.M. 8-17-65 on a technical charge of lottering issued from the Juvenile Court after (according to the affidavits of Mrs.

Affidavit of Avon N. Williams, Jr.

Flora Marie Hammonds and petitioner) having been seized about 11:00 P. M. at Hubbard Hospital by Metropolitan Detectives, submitted to Mrs. Carrie B. Silverman for an unsuccessful identification, and questioned at
[fol. 2] some length and for several hours in a car outside the Juvenile Court Building in the early morning hours of said day, before being turned over to the Juvenile Court at 5:25 A. M.

FURTHER DEPONENT SAITH NOT.

/s/ Avon N. Williams, Jr.

Sworn to and subscribed before me
this 16th day of June, 1969.

/s/ Mrs. Mavis W. Donnelly
Notary Public

Commission Expires: 7-29-69

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF MRS. FLORA MARIE HAMMONDS

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Mrs. Flora Marie Hammonds, after being duly sworn according to law, deposes and says:

That she is 38 years of age and resides at 2106-A Scovel Street, Nashville, Tennessee, and is the mother of Archie Nathaniel Biggers, the petitioner in the above case. On 16 August 1965 said petitioner, then a 16 year old child, arrived home at approximately 10:00 P.M. with a cut on his arm. The deponent took him to Hubbard Hospital, Nashville, Tennessee, for treatment of same reaching the hospital at about 10:30 P.M. Upon her arrival, she noticed Metropolitan Police were already there in connection with another case. A Negro detective inquired how petitioner got his arm cut. The petitioner then told the detective about the dog chasing incident at 18th and Scovel wherein he fell and hurt his arm. The Negro detective asked deponent for permission to take petitioner back to 18th and Scovel at that time. Deponent agreed to this upon the detective's promise to bring the petitioner home immediately afterward. Deponent then went home and, when the policeman did not return the petitioner home, telephoned the Metropolitan Police Station where the Police personnel to whom she talked seemed to know nothing about the case. Finally, about 2:00 or 3:00 A.M., 17 August 1965, being extremely concerned,

deponent went to the Metropolitan Police Station and was there advised by the Police that petitioner was across town at the Juvenile Court Building, 2nd and Lindsley, Nashville, Tennessee. She immediately went to the Juvenile Court Building where she found the petitioner in the custody of Metropolitan Police Officers who refused to release the petitioner to his parent, the deponent, although to the best of the petitioner's knowledge,
[fol. 2] said police officers had no warrant for the petitioner's arrest or detention at that time. The police officers advised deponent that petitioner had stated he wanted to take a lie detector test the next morning because he had nothing to hide. Later that morning, 17 August 1965, deponent was telephoned by the Metropolitan Police and requested to come down and take petitioner to a State building for the lie detector test. She arrived at the Juvenile Court Building about 8:00 A.M. that morning to find that the Metropolitan Police had already taken the boy from the Juvenile Court Building across town to the Metropolitan Police Station. At this time, deponent telephoned and engaged Mr. Z. Alexander Looby as attorney for the petitioner. Mr. Looby advised her not to have the child submit to a lie detector test. Deponent then immediately stated to the Metropolitan Police that petitioner was not to have a lie detector test on advice of his counsel and that the petitioner was being represented by Mr. Looby. Later that morning, deponent received a phone call from Mr. Looby advising her to return to Juvenile Court and pick up the petitioner since Mr. Looby had been informed the only charge against the child was a warrant for lottering. However, when deponent reached the Juvenile Court sometime late morning or early afternoon, the probation officer there informed her that the petitioner had been returned to the Police Station. When deponent returned to

the Police Station that afternoon (17 August 1965) she was informed by the Police that the petitioner had now been identified by a lady in Bordeaux on the charge of assault with intent to ravish and also by a Negro woman on a charge of rape and that he could not be released. Deponent was not at any time advised or informed by the Metropolitan Police or anyone else that the petitioner was being subjected or submitted to a show-up or any other identification procedures on 17 August 1965. Although the deponent was continuously seeking to obtain the release of the petitioner from the time when she first became concerned and called the Metropolitan Police Station about midnight or shortly thereafter on 16 August 1965, on to the afternoon of 17 August 1965, she was never informed by the Metropolitan Police of any charge against said minor child and that the only information that she received in that regard was that from her attorney about
[fol. 3] the lottering charge sometime after 8:00 A.M. 17 August 1965.

FURTHER DEPONENT SAITH NOT.

/s/ Mrs. Flora Marie Hammonds

Sworn to and subscribed before me
this 16th day of June, 1969.

/s/ Avon N. Williams, Jr.
Notary Public

Commission Expires: 8-7-71

PLAINTIFF'S EXHIBIT NO. 1
FILED: November 4, 1969
CASE NO. 5120
BRANDON LEWIS, CLERK
BY /s/ Guy W. Cooper, D.C.

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

AFFIDAVIT OF ARCHIE NATHANIEL BIGGERS

(Filed June 17, 1969)

STATE OF TENNESSEE

DAVIDSON COUNTY

Archie Nathaniel Biggers, after being duly sworn according to law, deposes and says:

That he is petitioner in the above case and is now twenty years of age, having been born 14 January 1949. On 16 August 1965, he was on his way home in the evening between 9:00 and 10:00 P.M. when he was attacked by dogs at 18th and Scovel Street, Nashville, Tennessee, and cut his arm when he fell to the ground in process of chasing them off. On reaching home, he was taken to Hubbard Hospital by his mother, Mrs. Flora Hammonds, and there they were accosted by a policeman who asked how he had received his injury. The petitioner told the policeman about the incident at 18th and Scovel, whereupon the policeman and deponent's mother held a conversation which resulted in the policeman being allowed to take the petitioner with them. The Metropolitan Police Officers then put the petitioner in their car and took him to an area of Nashville known as Bordeaux and to the home of a Mrs. Carrie D. Silverman where they submitted him alone to Mrs. Silverman for identification. Mrs. Silverman attempted but could not identify the petitioner. However, instead of taking the petitioner home, the Metropolitan Police Officers took the petitioner to the Juvenile Court Building where they kept him outside in the car questioning him for a long time.

Thereafter the officers took him into the Juvenile Court Building and left him there with the night attendant. By this time, it was dawn. Petitioner slept there until morning and had breakfast about 7:30 A.M., after which the Metropolitan Police Officers picked him up and took him to the Metropolitan Jail where they questioned him about two hours and then put him in a cell. Later on that day they brought him down from his cell and submitted him alone to Mrs. Margaret Beamer, the prosecutrix
[fol. 2] in the above case, and to other women for identification.

FURTHER DEPONENT SAITH NOT.

/s/ Archie Nathaniel Biggers

Sworn to and subscribed
before me this 16th day of
June, 1969.

/s/ Avon N. Williams, Jr.
Notary Public

Commission Expires: 8-7-71

[fol. 1] **In The United States District Court**
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 12:30 P.M., July 29, 1969)

In this habeas corpus proceeding, the Court remains of the opinion, expressed in its Order entered on May 12, 1969, that an evidentiary hearing is required to determine the issues in this cause. After reviewing the transcript and briefs, the Court desires open court testimony on the following matters: the nature of the "show-up" identification process as opposed to the "line-up" identification process, and why the former process was employed in the instant case; and, the general reliability of voice identification procedures, and their relative importance compared with other methods of identification in linking the petitioner to the offense alleged in the instant action.

It is ORDERED that an evidentiary hearing, confined to these issues, be set by the Clerk at the earliest time consonant with the Court calendar.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 8:30 A.M., April 17, 1970)

In this habeas corpus proceeding, the Court issued an order on July 29, 1969, to the effect that an evidentiary hearing should be held to determine whether or not there were unconstitutional irregularities in the identification process employed by the police in the instant case. This identification procedure was the primary basis for petitioner's indictment. In ordering such a hearing, the Court was particularly concerned with the validity of the so-called "show-up" identification method as it was used by police and, also, the reliability and validity of voice identification procedures utilized in the instant case. A hearing on these issues was held on October 30, 1969, and supplemental briefs were filed by both parties to the action several weeks later.

Before reaching the merits of petitioner's claims, a brief statement of the facts is in order. Petitioner, Archie Nathaniel Biggers, when 16 years of age, was convicted on a charge of rape in a jury trial and sentenced to 20 years in prison. On appeal to the Supreme
[fol. 2] Court of Tennessee, the conviction was affirmed. *Biggers v. State*, ... Tenn. ..., 411 S.W.2d 696 (1967). The case was then accepted for review by the Supreme Court of the United States on a writ of certiorari. *Biggers v. Tennessee*, 390 U.S. 404 (1968). Again, the conviction was affirmed. However, the affirmation was the result of an equally divided court and, therefore, did not amount to an adjudication of the merits of petitioner's claims so as to prevent him from bringing the instant habeas corpus action. [See the May 12, 1969

Order entered by this Court in the instant case; and also see, *Etting v. Bank of the United States*, 24 U.S. 59 (1826).]

The pertinent operative facts in light of the issues raised in the current proceeding are as follows. On the evening of January 22, 1965, Mrs. Margaret Beamer was attacked at knife-point by an intruder who broke into her home. Mrs. Beamer's screams aroused her thirteen-year old daughter who rushed to the scene and also began to scream. At this point, the intruder is alleged to have said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." This Mrs. Beamer did, whereupon she was taken from the house to a spot two blocks away and raped. The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice.

[fol. 3] Over a seven month period following the crime the police showed Mrs. Beamer various police photographs and had her attend several "line-ups" and "show-ups." However, the victim was unable to identify any of the persons shown to her as being her assailant. Finally, on August 17, 1965, petitioner was arrested as a suspect in the rape of another woman. While petitioner was being detained in connection with that case the police asked Mrs. Beamer to come to the police station to "look at a suspect." The identification process employed at this point was called a show-up. In this type of identification procedure, the suspect appears before the victim alone rather than in the company of others. The victim therefore does not have to attempt to choose one person from a group of persons presented to him, as in a line-up, but rather the victim knows that

the person presented to him for identification is one whom the police suspect of having committed the crime. At the instant show-up Mrs. Beamer identified petitioner as being her assailant. As to what transpired at the show-up, there is some conflict between the testimony given by Mrs. Beamer at the trial and that given by her at the evidentiary hearing held in this court on October 30, 1969. In testimony given at the trial, Mrs. Beamer testified that on viewing the petitioner the "first thing" that made her think he might be her assailant was his voice. However, at the October hearing, Mrs. Beamer testified that she identified petitioner positively prior to having him speak the words spoken by Mrs. Beamer's attacker more than seven months earlier during the crime—"You tell her to shut up or I'll kill you both." There is [fol. 4] also conflict between the testimony given by police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words.

At any rate, petitioner was identified at this show-up as being Mrs. Beamer's attacker, and the subsequent indictment and conviction of petitioner was based almost exclusively upon this station house identification.[1]

Turning now to a consideration of the legal consequences attaching to the identification process described above, the basic issue to be dealt with may be defined as follows: was petitioner subjected to a type of identification procedure, namely the show-up confrontation, which was so unnecessarily suggestive and conducive to irreparably mistaken

[1] There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial.

identification as to have the effect of denying due process of law to the petitioner? There are relatively few cases dealing with this issue and the validity of the show-up identification process in the light of due process considerations. However, the teachings of this small body of law point the way for decision of the issue now before the Court.

It is well settled that in the absence of exceptional circumstances any identification procedure, whether in the nature of a show-up or a line-up, employed without giving the suspect the right to have counsel present constitutes a denial of due process. *United States v. Wade*, 388 U.S. 218 (1967); and, *Gilbert v. California*, 388 [fol. 5] U.S. 263 (1967). Though petitioner in the instant case was not provided with the advice of counsel, the rule of *Gilbert* and *Wade* has no application here since that rule was not given retroactive effect. *Stovall v. Denno*, 388 U.S. 293 (1967). The *Stovall* decision makes it clear, however, that aside from the right to counsel, a suspect also has the right not to be subjected to police identification procedures which are so unfair, given the "totality of the surrounding circumstances," as to present a significant possibility of irreparably mistaken identification. Where such faulty procedures are employed, they present a "recognized ground for attack upon a conviction. . . ." See, *Stovall v. Denno*, *supra*, at 302; *Simmons v. United States*, 390 U.S. 377 at 383 (1967); and *Palmer v. Peyton*, 359 F.2d 199 (4th Cir., 1966). In light of these general principles, Mr. Justice Douglas succinctly stated the issue involved here in his dissenting opinion in the earlier consideration of petitioner's case by the Supreme Court of the United States. He pointed out that whether or not the procedure by which Mrs. Beamer identified petitioner denied him due process of law "must be evaluated in light of the totality of the

surrounding circumstances" with the view of determining if the procedure in petitioner's case "was so unduly prejudicial as fatally to taint his conviction." *Biggers v. Tennessee*, 390 U.S. 404 at 406 (1967).

The show-up identification process is, as the expert witness for petitioner testified, a far less re-
[fol. 6] liable method of identification than the line-up method. The fact that this is so has been given judicial recognition. In *Wise v. United States*, 383 F.2d 206 (D.C. Cir., 1967); and, *Wright v. United States*, 404 F.2d 1256 (D.C. Cir., 1968), it was stated that "the presentation of only one suspect in the custody of the police raises problems of suggestibility that brings us to the threshold of an issue of fairness." See also, *Biggers v. Tennessee*, *supra* at 407-408; and, *Stovall v. Denno*, *supra* at 302. See also, *Wall, Eye Witness Identification in Criminal Cases* 26-40, and Paul, *"Identification of Accused Persons,"* 12 Austl. L. J. 42, 44 (1938) (as cited by Mr. Justice Brennan in the majority opinion in *Stovall v. Denno*, *supra*.)

The problem intrinsic in the show-up identification process is perhaps best stated as follows:

> Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections. *Biggers v. Tennessee*, *supra* at 407 (Justice Douglas' dissent.)

However, the use of the show-up process is not *per se* unconstitutional. Where special circumstances such as an urgent need for rapid identification are present, show-ups are allowable. For example, in *Stovall*, the Court found that the show-up was permissible and
[fol. 7] within the bounds of due process where the procedure was conducted in the hospital room of the victim who was at the point of death following a stabbing attack. Clearly, in that case, there was no time to conduct a line-up and the urgency of the situation demanded that if any eye-witness identification was to be obtained at all it had to be obtained by the show-up method. The "totality of surrounding circumstances" was such that the show-up was found to be permissible.

Aside from the urgent sort of deathbed situation which occurred in the *Stovall* case, thorough analysis of case law in the area reveals certain other sets of circumstances in which a show-up has been held permissible. For example, courts have upheld the constitutionality of the show-up where the witness had an unusually good and sustained opportunity to view the participants in the commission of the crime. The theory of the courts is that this particular circumstance makes it unlikely that a show-up would lead to misidentification. See, *United States ex rel. Gracia v. Follette*, 417 F.2d 709 (2d Cir., 1969); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir., 1969); *United States ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2d Cir., 1969); *Cline v. United States*, 395 F.2d 138 (8th Cir., 1968); and *Hanks v. United States*, 388 F.2d 171 (10th Cir., 1968). Show-ups have also been given court approval where the confrontation between the witness and the accused occurs "so near the time when the alleged crime was committed" that the chance of misidentification

[fol. 8] is minimal. The time period within which the show-up may be permissible ranges from a few hours to a few weeks. See, *United States ex rel. Williams v. LaValle*, 415 F.2d 643 (2d Cir., 1969); *Stewart v. United States*, 418 F.2d 1110 (D.C. Cir., 1969); *United States ex rel. Anderson v. Mancusi*, 413 F.2d 1012 (2d Cir., 1969) (suspect identified within hours of crime); *Clark v. United States*, 408 F.2d 1230 (D.C .Cir., 1968) (suspect identified within a few weeks and a "very positive spontaneous identification" by the witness); and, *Bates v. United States*, 405 F.2d 1104 (D.C. Cir., 1968). Also, where the show-up was conducted following other independent identification by the witness (i.e., photographic identification), or a particularly good description of the participant in the criminal act, courts have tended to approve the procedure. See, *United States v. Thompson*, 417 F.2d 197 (4th Cir., 1969).

While the show-up has been approved within the context of the four situations described above, the courts have zealously guarded the rights of the accused where the show-up procedure was conducted in a manner so suggestive and conducive to irreparably mistaken identification as to amount to a denial of due process. For example, a show-up was expressly disapproved where a witness was shown a lone suspect and asked, "Is this the man?" In this situation, the court stated that the words and actions of the police in contriving the show-up clearly indicated to the witness that the police thought this suspect had committed the crime, thereby contributing [fol. 9] to a "mutual reinforcement of opinion" likely to lead to mistaken identification. See, *Clark v. United States*, 294 F. Supp. 44 (D.D.C., 1968). In another case, a Circuit Court of Appeals upheld the holding of a federal district judge that a cell block confrontation

between a witness and a suspect was unnecessarily suggestive and therefore the identification obtained from the show-up could not be introduced at the trial. That show-up was objectionable on due process grounds because the suspect had been presented alone to the witness in a screened-off portion of the jail and the witness knew beforehand that the suspect was considered by police to be the culprit. See, *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir., 1968); *and see also*, *United States v. Gregg*, 414 F.2d 943 (7th Cir., 1969).

In yet another case, a show-up identification was disallowed because the identifying witness did not have the opportunity to obtain a good view of the pargicipants in the crime. See, *United States v. Gilmore*, 398 F.2d 679 (7th Cir., 1968). The hesitancy of a witness to make a positive identification in a show-up has also been said to indicate the type of misidentification danger which would contravene constitutional requirements of due process.

These cases make it quite clear that while a show-up is constitutionally acceptable in certain situations, courts will look carefully at the factual situation surrounding the show-up to determine whether or not the procedure was conducted in such a manner as to violate due [fol. 10] process requirements. Courts also have looked to the surrounding circumstances to determine whether or not a line-up should have been conducted rather than the show-up with its attendant dangers of misidentification. For example, where police custody is involved, it has been held that the need for a formal line-up may not be circumvented by keeping a suspect away from the stationhouse until an informal show-up confrontation can be contrived. See, *United States v. Venere*, 416 F.2d 144 (5th Cir., 1969).

The *Stovall* case and the cases discussed immediately above make it clear that while the practice of showing suspects singly to witnesses for identification is widely condemned, each case of this type must be judged on its own facts and that convictions based on show-up identifications will be overturned only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See, *Simmons v. United States*, 390 U.S. 377 at 384 (1967). Though the show-up is clearly a less reliable method of identification than the line-up, it is necessary in some circumstances and this Court does not subscribe to a rule that would prohibit its use as a matter of constitutional requirement. However, the "totality of surrounding circumstances" must be examined closely in this case to determine whether special circumstances or exigencies such as those described above existed which would warrant the use of the show-up instead of the more reliable line-up procedure.

[fol. 11] On this basis the Court must conclude that the circumstances here present are not such as to warrant the show-up procedure and, consequently, that its use at petitioner's trial denied him due process of law. Respondent, arguing in support of the use of the show-up procedure, relies chiefly on the contention that a show-up was actually fairer to petitioner than a line-up would have been since no prisoners were readily available in either the Metro Jail or the juvenile home whose general description matched that of petitioner. To have conducted a line-up under these circumstances, contends respondent, would have had a greater tendency to cause a misidentification because in a dissimilar group the physical characteristics of petitioner, whose general description matched that of

Mrs. Beamer's assailant, would have been unduly accentuated. This argument has perhaps some value but it is at best debatable. According to expert testimony produced by petitioner's attorneys, a line-up where no one had physical characteristics similar to petitioner would have been less preferable than one where members of the group all had certain similar characteristics but, in any event, would be preferable to a show-up. This conclusion is derived from the belief that any line-up would be a better test of the victim's memory since it would demand the exercise of some selectivity in identification. Furthermore, there is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call [fol. 12] to the juvenile home and a screening of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process. Here, there was no evidence of any deathbed urgency as in *Stoval* which would have precluded the police from delaying the identification procedure until a suitable line-up could have been arranged. The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate show-up rather than a much more reliable line-up. Furthermore, none of the other circumstances which the above discussed cases indicate may justify a show-up existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view

of the suspect during the commission of the crime.[2] Also, the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission.[3] Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical [fol. 13] description of her assailant.[4] The nature of the show-up as conducted in this case—with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner,[5] the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant—tended to maximize the possibility of misidentification of the petitioner. True, it may have been more convenient for the police to have a show-up. However, in matters of constitutional due process where police convenience is balanced against the need to extend basic fairness to the suspect in a criminal case, the latter value should always outweigh the former. In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected.

---

[2] The only other eye-witness, Mrs. Beamer's daughter could not identify Biggers. And see, the case of United States ex rel. Garcia v. Follette, supra and accompanying text and cases.

[3] See the case of United States ex rel. Williams v. LaVallee, supra, and accompanying text and cases.

[4] See the case of United States v. Thompson, supra, and accompanying text and cases.

[5] See United States v. Gilmore, supra, and accompanying text.

Due process of law and basic fairness demand that the most reliable method of identification possible be used in a criminal case. See, *Simmons v. United* [fol. 14] *States*, *supra*, at 383-384. The conduct of the show-up in this case created an atmosphere which was so suggestive as to enhance the chance of misidentification and hence constituted a violation of due process.

Clearly, this identification did not amount to a harmless error, since the victim's identification of petitioner was virtually the only evidence upon which the conviction was founded. See, *Chapman v. California*, 386 U.S. 18 (1966).

In view of this conclusion, the Court finds it unnecessary to reach the issue of whether voice identification as used here amounted in itself to a violation of due process. It may be that the validity of such identification should normally be left to the jury. Since the voice identification took place during the show-up and the show-up procedure itself is unconstitutional as employed in this case, there is no reason to reach the specific issue raised concerning voice identification.

Accordingly, judgment will be entered granting the application of Archie Nathaniel Biggers for a writ of habeas corpus, voiding the conviction obtained in the state court, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge, any such new trial to be "unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place." *Biggers v. Tennessee*, *supra* at 409.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

MOTION TO RECONSIDER

(Filed April 24, 1970)

Comes the Respondent, Lake F. Russell, and moves the Court to reconsider its Order of April 17, 1970, in the above captioned matter insofar as such Order holds that the affirmance of Petitioner's conviction by an equally divided United States Supreme Court was not an adjudication on the merits of his claims so as to prevent him from bringing the instant habeas corpus action for the reasons stated in the accompanying memorandum brief.

/s/ James C. Dale, III
JAMES C. DALE, III
Special Counsel
State of Tennessee
706 Nashville Bank and Trust Building
Nashville, Tennessee 37201

[Certificate of Service Omitted]

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

ORDER

(Received for Entry 9:00 A.M., May 4, 1970)

Respondent in the instant case has filed with the Court a Motion to Reconsider. In so doing, respondent alleges that the Court erred in accepting jurisdiction over the instant habeas corpus matter and in deciding on the merits of petitioner's claims. Respondent's allegation of error rests on the proposition that the affirmation of petitioner's conviction by reason of the equal division of opinion of the United States Supreme Court when it heard petitioner's case in *Biggers v. Tennessee*, 390 U.S. 404 (1968), was an adjudication that "is as conclusive and binding upon the parties as if rendered upon the concurrence of all participating judges upon every question involved in the case." Respondent further contends that since the issues raised in this case have been thus "adjudicated" by the Supreme Court, the doctrine of res judicata should apply and the instant petition should have been dismissed by the Court.

[fol. 2] The issue raised by respondent's present motion may be stated thusly: In a habeas corpus proceeding, does an affirmation by reason of an equal division of opinion among the Justices of the Supreme Court amount to an adjudication between the parties which, even though no decision was rendered as to the merits of petitioner's claim, must be considered final in that the doctrine of res judicata would bar petitioner from raising the same constitutional claims in a subsequent habeas corpus petition?

After a thorough consideration of the case law relevant to the issue, the Court remains of the opinion expressed

in its Order of May 12, 1969, that the merits of petitioner's constitutional claims were left undecided by the equally divided Supreme Court and that the doctrine of res judicata does not operate in such a manner as to bar petitioner from raising those constitutional claims again as presented in his habeas corpus petition. It is generally true that when the Supreme Court is equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. *Etting v. Bank of the United States*, 24 U.S. 59 (1826). Furthermore, as respondent points out, there is a general rule to the effect that "an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged ...." *Hertz v. Woodman*, 218 U.S. 205 (1910); and see *United States v. Pink*, 315 U.S. 203 (1942); *Durant v. Essex Co.*, 74 U.S. 107 (1868); and, *Kaku Nagana v. Brownwell*, 212 F.2d 262 (7th Cir. 1954). However, the Court is of the view that the general rule espoused in the above cited cases cannot be [fol. 3] taken to stand for the proposition that a technical affirmation which results from the fortutious circumstance of an equally divided court and which makes no pronouncement, either pro or con, on the merits of the constitutional claims of a habeas corpus petitioner, must be protected by the doctrine of res judicata. The cases cited by respondent in support of his argument are unconvincing since they deal wholly with litigation concerning property rights[1] rather than the right of a criminal

[1] In cases involving contract rights, various property rights, tax liability questions, etc., there are overriding economic and administrative interests in seeing that finality is achieved in litigation so that "business can proceed as normal." The cases cited by respondent make this very clear. In **Hertz v. Woodman**, 218 U.S. 205 (1910) the Court was concerned with deciding who was entitled to the possession and enjoyment of a distributive

(Continued on following page)

defendant to due process of law where there is a possibility that his liberty or even his life may be forfeit. As the leading cases on the effect of affirmation due to an evenly divided court make clear, the principles of law which are argued in such a case are not decided but, rather, are left unsettled. In such a circumstance, the Court affirms out of necessity since, in its evenly divided state, it cannot overturn the lower court ruling. Such an affirmation is a technicality only, growing out of the policy of judicial administration that there must at some point
[fol. 4] be an end to litigation. See, *Etting v. Bank of the United States*, 24 U.S. 59 (1826).

It is inconceivable that a technical rule such as this, born to serve the needs of judicial administration, could be employed to deny a criminal defendant the right to obtain a full judicial determination of his constitutional claims in the federal courts. Certainly, it would amount to a travesty on justice if such a result were permitted. In the circumstances surrounding this case that travesty would be compounded by the fact that the even split of opinion occurred because of the necessity of Mr. Justice Marshall having to recuse himself apparently due to past professional association with petitioner's attorneys. The liberty of petitioner and others like him should not be left to the mercy of mere fortuity.

(Continued from preceding page)

share of an estate for tax purposes; in **Durrant v. Essex Co.**, 740 U.S. 107 (1868) the question involved rights in certain realty; in **United States v. Pink**, 315 U.S. 203 (1941) the Court was concerned with the disposition of surplus funds of a Russian insurance company; and in **Kaku Nagana v. Brownwell**, 212 F.2d 262 (7th Cir. 1954) suit was brought to recover stock vested by an alien property custodian pursuant to the Trading with the Enemy Act.

Fortunately, it has been recognized from early common law days to the present that such technicalities cannot be used to thwart the right of the criminal defendant to have the merits of his constitutional claim fully adjudicated. As the United States Supreme Court has recently stated: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1 at 8 (1962).[2] Indeed, it has long [fol. 5] been recognized as a "familiar principle that *res judicata* is inapplicable in habeas proceedings." *Fay v. Noia*, 372 U.S. 391 at 423 (1962). If government is always to be accountable to the judiciary for a man's imprisonment, then access to the courts by way of habeas corpus must not be thus impeded. "The inapplicability of *res judicata* to habeas, then, as inherent in the very role and function of the writ." *Sanders v. United States*, *supra* at 8; and see e.g. *Fay v. Noia*, *supra* at 402; *King v. Suddis*, 1 East 306, 102 Eng. Rep. 119 (K.B. 1801); and, *Cox v. Hakes*, 15 A.C. 506 (H.L., 1890).

The Court is not persuaded by respondent's proposed interpretation of 28 U.S.C.A. §2244(c) dealing with the finality of determinations by federal courts in habeas corpus proceedings. As *Sanders* makes clear, §2244(c) was "not intended to change the law as judically evolved." Furthermore, "if construed to derogate from the traditional liberality of the writ of habeas corpus, ... §2244 might raise serious constitutional questions."[3] *Sanders*

[2] See Note 1 supra.

[3] See U. S. Const. Art. I § 9, cl. 2 which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

v. United States, *supra* at 11-12 and see, *Fay v. Noia*, *supra* at 406.

It should be made clear that while *res judicata* is inapplicable in habeas corpus proceedings, it is proper for a judge to deny subsequent applications for habeas corpus relief on the ground that the first denial had followed a full hearing on the merits. However, it should also be made clear that a judge is *permitted* to dismiss on such grounds and *not required* to order a dismissal
[fol. 6] by reason of any considerations of *res judicata*. See, *Salinger v. Loisel*, 265 U.S. 224 (1960); and, *Sanders v. United States*, *supra*.

The *Sanders* case is instructive as to the types of situations in which a judge may correctly elect to dismiss a habeas corpus petition on the ground that a previous hearing has disposed of the petitioner's claims on their merits. *Sanders* states that:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus of §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders*, *supra* at 15.

and further that:

> "No matter how many prior applications for federal collateral relief a prisoner has made, [controlling weight may not be given to denial of prior application] if a different ground is presented by the new application [or] *if the same ground was earlier presented but not adjudicated on the merits*." [Emphasis added]. *Sanders*, *supra* at 17.

Looking to the facts here presented in light of the *Sanders* rule and the foregoing reasoning, the Court concludes that the prior hearing of petitioner's appeal by the United States Supreme Court did not determine the merits of petitioner's constitutional claim. Further, as the memorandum opinion issued by the Court on April 17, 1970, makes clear, the ends of justice have [fol. 7] been served by this Court in hearing petitioner's case and reaching the merits of the constitutional claims presented. The fact that petitioner's conviction was technically affirmed by reason of the United States Supreme Court's even division of opinion is of no consequence here since the merits of the claim were not adjudicated. Even if they had been adjudicated, *Sanders* shows that those claims would not have been automatically barred from consideration by this Court in a habeas corpus proceeding.

It occurs to the Court that there is yet another logical reason to support its decision to consider petitioner's claim. The United States Supreme Court hearing in the *Biggers* case followed the acceptance by the Court of a writ of certiorari to review the affirmation of petitioner's conviction by the Tennessee Supreme Court. The fortutous circumstance of an equally divided United States Supreme Court simply had the effect of leaving undisturbed without opinion the ruling of the State Supreme Court. Therefore, the instant habeas corpus petition is, in effect, an *initial* federal habeas corpus petition alleging error in a state criminal conviction. This being the case, the Supreme Court of the United States has recently established the proposition that notions of finality, such as *res judicata*, forfeiture, or waiver, cannot be applied so as to preclude the intial consideration of federal constitutional claims in a federal court. *Fay v. Noia*, *supra* at 428.

[fol. 8] Finally, it should be readily apparent that the situation presented in the instant case is highly analagous to the situation where a criminal defendant, after appealing his case to the highest state court, has had his conviction affirmed by that court and has subsequently sought relief by way of habeas corpus petition in a federal district court. The analogy may be drawn as follows. Due to the equal division of opinion among the Justices, the United States Supreme Court did not decide this case on its merits. Therefore, the Tennessee State Supreme Court is the highest court to have expressed an opinion as to the merits of petitioner's claim. That being the case, the Court is of the view that petitioner Biggers stands in essentially the same position as a criminal defendant who, having exhausted his state court remedies pursuant to 28 U.S.C.A. §2254, makes application for habeas corpus relief in federal district court. In such a situation, and in the instant situation, this Court has jurisdiction to fully adjudicate petitioner's constitutional claims since it is an unchallengable principle of law that in habeas corpus cases the ruling of the highest court of a state on a constitutional claim never bars consideration of the same constitutional issue by a federal district court. Principles of *res judicata* simply have no application in this situation.

[fol. 9] Accordingly, for the foregoing reasons the Court concludes that the technical affirmation of petitioner Biggers' state conviction by reason of the equally divided court does not foreclose this Court from disposing of the petitioner's constitutional claim on its merits. Therefore, respondent's Motion to Rehear should be, and the same is hereby, dismissed.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE

[fol. 1] In The United States District Court
Middle District of Tennessee, Nashville Division

[Title omitted in printing]

NOTICE OF APPEAL

(Filed May 11, 1970)

Notice is hereby given that William S. Neil, Warden, Respondent above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order sustaining the petition for the writ of habeas corpus, entered in this action on the 17th day of April, 1970.

May 7, 1970.

/s/ James C. Dale, III
James C. Dale, III
Special Counsel
State of Tennessee
706 Nashville Bank and Trust Building
Nashville, Tennessee 37201

A. 53

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ARCHIE NATHANIEL BIGGERS,
Petitioner

Vs.

LAKE F. RUSSELL, Warden,
Tennessee State Penitentiary,
Respondent

FILED
JUN 15 1970
BRANDON LEWIS, Clerk
By L. M. Edwards, DC

CIVIL ACTION
No. 5120

BEFORE: The Honorable William E. Miller, Judge

TRANSCRIPT OF PROCEEDINGS

Nashville, Tennessee
November 4, 1969

[2]

APPEARANCES:

FOR THE PETITIONER:
Mr. Michael Meltsner
Suite 2030
10 Columbus Circle
New York, New York, 10019

FOR THE RESPONDENT:
Mr. James C. Dale, III
Bailey, Ewing and Dale
Nashville Bank and Trust Building
Nashville, Tennessee

[3]

INDEX

WITNESS	Direct	Cross	Redirect	Recross
Opening Statements:				
Mr. Meltsner	5			
Mr. Dale	13			
William A. McDaniel, Jr.	17	32	39	
Dr. Irwin Pollack	47	62	83	
Flora Marie Hammonds	85	87		
Petitioner rests	88			
Margaret Frances Beamer	88	97		
Floyd Bailey	101	104		
Respondent rests	104			

PETITIONER'S EXHIBITS

NUMBER	Description	Ident.	Filed
1	Affidavits of Petitioner, Mrs. Flora Hammonds, Mr. Avon M. Williams, Jr., and Transcript of Record, Supreme Court of the United States	11	11
2	Curriculum Vita, Irwin Pollack, September, 1968	49	49

[4]

TRANSCRIPT OF PROCEEDINGS

THE COURT: Call the case, Mr. Clerk.

THE CLERK: Case No. 5120, Archie Nathaniel Biggers v. Lake F. Russell, Warden.

MR. DALE: If the Court please, I think Mr. Meltsner has been introduced to the Court informally, but I thought I would take this opportunity to request his admission to practice before this Court. He is a member of the Bar of the State of New York, of the Supreme Court of the United States, of the Fourth, Fifth and Eighth Circuit Courts of Appeals, and I request his admission to practice before this Court.

THE COURT: All right, sir, glad to have you to participate in the case.

MR. MELTSNER: Thank you, sir.

THE COURT: We're glad to have you to participate in the case, and you will begin by giving me a short history of the case and a statement of the issues involved.

MR. DALE: Mr. Meltsner, do you think we better have our witnesses step outside?

THE COURT: How many witnesses are there?

MR. DALE: We have one in the courtroom, if Your Honor please.

THE COURT: Well, let the witnesses be excused

[5]

to the witness room, retire to the witness room.

(Whereupon, the witnesses were excused from the courtroom under the rule of exclusion.)

MR. MELTSNER: Briefly, Your Honor, this case was tried in the Criminal Court of Davidson County, in

1965. The evidence at that time showed that there had been a rape occurring in Nashville in January, 1965. The victim had been a Mrs. Margaret Beamer.

THE COURT: What's the name?

MR. MELTSNER: Beamer, B-e-a-m-e-r.

THE COURT: All right.

MR. MELTSNER: Some seven months subsequent to that rape, a police officer at the Hubbard Hospital saw a young man receiving medical attention for a cut on his arm, and the young man who is the Petitioner here, Archie Nathaniel Biggers, was with his mother at the hospital at that time. The date is August 16, 1965.

The officer then asked the boy's mother if he could take him back to the place on Scovel Street in Nashville where the young man had said that he had fallen while chased by dogs and been cut.

The young man was taken away by the police and subsequently lodged in the Juvenile Detention facilities here in Nashville for the rest of that night and sometime during the following day, the 17th of August, he was taken across

[6]

town to the Metropolitan Police headquarters, and there was walked into a room in the homicide division where Mrs. Beamer was seated. There were also four or five police officers present. One of the police officers told Biggers to say, "Shut up or I'll kill you", words which had been spoken by the rapist seven months earlier. He spoke those words, and Mrs. Beamer identified him as the rapist.

At trial, her identification of him was the only evidence of Biggers' guilt. The only other state's witnesses, aside from a doctor who testified that there had indeed been a rape, were four or five of the police officers who had been

present, and they merely corroborated that Mrs. Beamer had in fact identified Biggers at police headquarters.

An appeal was taken from the conviction to the Supreme Court of Tennessee, and in that appeal, the character and circumstances of the identification were challenged on federal constitutional grounds. The Supreme Court of Tennessee affirmed, and the petition for writ of certiorari was granted by the Supreme Court of the United States. As Your Honor knows, that Court affirmed by an equal division of the eight sitting Justices, Mr. Justice Douglas writing a dissenting opinion.

Shortly thereafter, this petition was filed in this Court, but I do think it appropriate at this point to mention that subsequent to the affirmance by an equally-divided

[7]

Court in Petitioner's case, the Supreme Court granted review in a case raising very similar issues, that being Foster v. California, and decided by a vote of five to four some of the circumstances which make an identification of this sort violative of the due process clause of the Fourteenth Amendment.

The claims presented to Your Honor by the petition and the answer are primarily whether the identification herein, under the totality of the circumstances doctrine, did in fact violate the Fourteenth Amendment; whether, and here I want to draw a rather fine distinction, but one I think is explicitly merited by the Supreme Court decision in Wade v. United States, whether the state use of what Biggers was required to say for purposes of identification at trial violated the Fifth Amendment as incorporated in the Fourteenth, in other words, whether the state is able to put on a witness who can say, as Mrs. Beamer did, he said, "Shut up or I'll kill you," at the pre-trial

identification proceeding when that testimony is compelled at the pre-trial identification proceeding.

THE COURT: Now at the actual trial itself, she did testify?

MR. MELTSNER: Mrs. Beamer?

THE COURT: Yes.

MR. MELTSNER: Yes, she did testify.

THE COURT: And did she identify the defendant at that time, or did she—was her testimony substantially

[8]

the same as her statement at the pre-trial identification here?

MR. MELTSNER: As I read her testimony, Your Honor, it's quite plain that what she did was describe her pre-trial identification. At no time during the trial did she point him out in the courtroom. At no time did she say, it's that man over there, it's the second man from the right at the table, nothing of that sort occurred, and I believe Mr. Justice Douglas, in his opinion, drew the same conclusion from the record.

THE COURT: She identified him, in other words, from—on the basis of what he had said at the lineup?

MR. MELTSNER: On the basis of what he had said and also his physical appearance at the showup, at it's—

THE COURT: Showup?

MR. MELTSNER: As it's generally called.

THE COURT: Yes.

MR. MELTSNER: She told the jury what had happened in effect. She never identified him in the courtroom.

THE COURT: Now what is the distinction between a showup and a lineup?

MR. MELTSNER: Well, the literature generally draws the distinction that when a suspect is presented individually

for identification, that is called showup; when he is presented with additional persons so that there can be some comparison of sizes, shapes, voice and the like, that is

[9]

called a lineup.

There are two other claims which are before the Court briefed in our trial memorandum which we filed sometime ago. One is that the identification of the Petitioner was the fruit of an unlawful arrest, and the last is that some prejudicial remarks made by the prosecuting attorney was reversible error. The primary claims relate to the constitutionality of these identification procedures in the circumstance of this case.

Now on the basis of the petition and the answer, I think it's fair to state that there are no substantial differences between the parties as to the facts. Rather the parties differ as to the constitutional application of generally-agreed upon facts.

Thus today the Petitioner seeks to the extent possible to amplify and explore the meaning of the facts in this case as was described in this Court's order of July 29, 1969, where the Court states a desire to receive testimony on the following matters, and I quote:

> "The nature of the 'show-up' identification process as opposed to the 'line-up' identification process, and why the former process was employed in the instant case; and, the general reliability of voice identification procedures, and their relative importance compared with other methods of identification in linking

[10]

> the petitioner to the offense alleged in the instant action."

We have two witnesses who we would like to present with respect to these questions, but first I would like to move the admission of the transcript of record of the state court proceedings as reproduced before the Supreme Court of the United States and the affidavits of Petitioner, his mother, Mrs. Hammonds, and Attorney Williams, which are on file and which were authorized to be filed by this Court's order of July 1, 1968. I think that will shorten the—

THE COURT: Let's see, July 1st?

MR. MELTSNER: Yes, Your Honor entered an order at that time authorizing that affidavits be filed on behalf of the parties.

THE COURT: All right.

MR. MELTSNER: And in response to that, I believe we filed those three affidavits and the transcript of record.

THE COURT: All right. There's no objection to that?

MR. DALE: Not at all, if Your Honor please. I think the transcript, although I'm not certain that it is the one prepared for the Supreme Court, is already an exhibit in the answer of the Respondent in this case.

THE COURT: Well, as long as it is a full and

[11]

complete transcript of the state trial procedures. You have one that you've tendered to the Clerk?

MR. MELTSNER: Yes, I believe one was tendered along with those affidavits, if I may look.

THE COURT: Well, let it be filed and file the affidavits.

MR. MELTSNER: May I have just a moment, Your Honor?

THE COURT: Yes.

MR. MELTSNER: I had thought that we had forwarded to the Clerk a copy of this which is the Supreme Court

transcript. Perhaps it's in the envelope.

THE COURT: Yes, might be in the envelope.

[MR. MELTSNER:] One of my witnesses has a copy of this.

THE COURT: Yes.

MR. MELTSNER: And I would appreciate, when he comes back, I would place that in evidence with the Clerk.

THE COURT: All right.

MR. MELTSNER: It's probable that what the Clerk has is the same, but as I am certain that the contents of this represents the entire record—

THE COURT: Well, let it be filed, the Supreme Court record—

MR. MELTSNER: Thank you.

THE COURT: —of the trial and these affidavits,

[12]

Mr. Clerk.

THE CLERK: All right, sir. Exhibit 1 to the petitioner.

(PETITIONER'S EXHIBIT NO. 1 was marked for identification and filed.)

THE COURT: Now let's see exactly what posture we're in. The Supreme Court of the United States divided four to four, is that right?

MR. MELTSNER: That's correct.

THE COURT: And it was affirmed?

MR. MELTSNER: That's right, it was affirmed, but—

THE COURT: Now what are we examining here that has not already been adjudicated by the Supreme Court?

MR. MELTSNER: Well, the law has recognized, I believe, in one of Your Honor's previous orders in this case, that is—I can't quote the latin particularly well,

but that is an affirmance by a split decision is of no precedential value even in Petitioner's case.

THE COURT: All right.

MR. MELTSNER: Thus we are trying the constitutional issues here much as in any other habeas corpus petition, as if the Petitioner had never gone to the Supreme Court of the United States.

THE COURT: Yes. In other words, the hearing

[13]

before the Supreme Court of the United States was from an appellate review from the highest court of the state?

MR. MELTSNER: That's correct, it was a review.

THE COURT: And this is an original application for habeas corpus in this Court?

MR. MELTSNER: Correct.

THE COURT: All right. Well, let's see what Mr. Dale has to say in response.

MR. DALE: If Your Honor please, I would like to take issue with two of the statements relating to the facts of this case, that Mr. Meltsner has presented.

In the first place, the State will show, and I think the transcript amply indicates, that Mrs. Beamer did not identify Biggers, the Petitioner in this case, until after—or she did identify him prior to his speaking the words that he was requested to speak.

Now he was in fact requested to speak the words to the effect, "Shutup, or I will kill you", but it is our position, and the transcript shows and the witnesses that the State has here today will show to the Court that in fact she identified him before he was compelled to speak those words.

In addition—this relates to an inference to be drawn from what is contained in the transcript—in no less than two places within the transcript during Mrs. Beamer's

testimony, she was asked first by the prosecutor, is there any

[14]

doubt in your mind, she said, there is no doubt. She was asked later on in the same testimony pertaining to her identification of Mr. Biggers, is there any doubt in your mind today? She said, no, there is no doubt.

So these are factual differences. I think that by and large Mr. Meltsner is accurate when he says that we agree on the facts, but I will not stipulate any fact that he wishes to—that we do not—we will prove our case today, if Your Honor please.

Now I would also like to state that I think that the major issue before us is the issue stated in Stovall v. Denno, after the Supreme Court indicated that Wade and Gilbert would not be retroactively applied. The Court there said that the issue was, or their area of inquiry was whether the confrontation conducted in this case was so unnecessarily suggestive and conducive to mistaken identification, that he was denied due process of law.

I think that's the sole issue in the case. I think requiring him to speak is, as in Schmerber, characteristic of identification. He was not required to say, "I am guilty". He was required to speak or asked to speak simply so that the tone or timber of his voice, if you will, if possible—

THE COURT: Were these the words that were alleged to have been uttered at the time of the rape?

MR. DALE: That's my understanding, some words

[15]

similar to those.

THE COURT: And your proof will be directed to showing why this kind of lineup was used?

MR. DALE: We will get into that, yes, sir.

THE COURT: Showup instead of a lineup?

MR. DALE: Yes, sir, we will show, and I will state to the Court what our proof will show, this man, the Petitioner in this case, was sixteen years old. He was substantially larger, I believe, than he is now. I think he must have lost some weight, but in any event, he was about two hundred, two ten, over two hundred pounds, and over six feet tall at that time.

He was sixteen years old. If you put him in a lineup with juveniles, and of course he stands out because of his size; if you put him in a lineup with adults, he stands out because of his youth, so there was really no way a lineup could be held, and our proof will show that, but again, I don't think—I do believe that the only issue of constitutional proportions is the question of whether or not the confrontation was unduly suggestive.

THE COURT: Well, what was this—I haven't recently looked at the Supreme Court decision, but what was the split between the Court caused by? What was the issue?

MR. DALE: There is no—you mean in the Biggers case?

[16]

THE COURT: Yes.

MR. DALE: There was no opinion.

THE COURT: No amplification or elaboration?

MR. DALE: The only elaboration was Mr. Justice Douglas' dissent.

THE COURT: And what was his dissent?

MR. DALE: His dissent, if Your Honor please, I read the case yesterday, but as best I recall, he simply said that lineups and showups, where not conducted superfairly, to coin a phrase, are unduly suggestive and violate due

process, and he would, of course, have reversed the conviction. I can't recall exactly what he said.

THE COURT: Well, something similar.

MR. DALE: But there was no opinion on the part of the four who voted to affirm, so we have no way of knowing what the actual split was.

Mr. Justice Marshall did not participate, which accounts for the lack of an odd vote.

I guess that is the State's position.

THE COURT: All right. Well, let's—suppose you call your first witness then.

MR. MELTSNER: Your Honor, I will do that. I wonder—I realize that you may wish to hear legal argument later, but I did want to point out one thing.

THE COURT: All right.

[17]

MR. MELTSNER: And that is shown from page 205 of the Supreme Court record in this case, not only did a number of witnesses testify concerning the reliance of the witness, Mrs. Beamer, on voice identification, but the Supreme Court of Tennessee made such a finding in its opinion.

I just wanted to call that to your attention.

THE COURT: All right, you might pass that transcript up here.

MR. MELTSNER: This is my copy which is muchly annotated. Forgive me for that, it's had a long trip.

MR. DALE: Mr. Meltsner, how is the pagination on that? Does it conform?

MR. MELTSNER: In the beginning, it refers to both the state trial record and a printed version. In other words, the index describes two sets of pagination.

MR. DALE: I see.

MR. MELTSNER: We would call Captain McDaniel first.

WILLIAM A. McDANIEL, JR.,

a witness called to testify by and in behalf of the Respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

[18]

Q Where are you employed?
A Metropolitan Police Department, Davidson County.
Q And what is your rank?
A Captain, Criminal Investigation Division.
Q And what was your rank in 1965, captain?
A I was a lieutenant.
Q How many years have you been a police officer?
A In March, be twenty-three years, sir.
Q And were you familiar with the 1965 rape prosecution of the petitioner, Archie Nathaniel Biggers?
A I am, sir.
Q You testified at his trial?
A Yes, sir.
Q Is that not correct?
A Yes, sir.
Q And am I correct that you were the highest ranking police officer directly involved in the investigation of that case?
A During this time, I was lieutenant in charge of personal crime, but I did have other higher superior officers over me to take the division.
Q In the detective division?

A Yes, sir.

Q Did you have a number of officers working under you?

[19]

A Yes, sir.

Q And in the investigation of this case?

A Yes, sir.

Q Now I want you to answer this from your experience as a police officer, when a suspect is shown alone to a witness for identification, that is generally called a showup, isn't it?

A Well, we don't use that term "showup". We—if we are going to have someone, we usually prefer a lineup.

Q You call it a lineup even if there is only one person?

A No, no. This particular case, we did not have a lineup. This is not what I consider as a lineup.

Q What would you call the kind of identification procedure employed in this case? Is there some police term for it?

A No.

Q The one-on-one identification?

A Not that I know of, sir, just under the circumstances, it was the only means that I could see that we could use.

Q Well, let me just ask you this, have you ever heard of the word "showup" before?

A I've heard of it, yes, sir.

Q And what did you understand it to mean?

[20]

A Well, just like I say, some use showup; I use lineup.

Q You thought showup meant the same as lineup?

A That's my interpretation, yes, sir.

Q But you do recognize there is something different between an identification procedure where one person is shown to a victim, and an identification where a number of persons are shown to the victim?

A There's a difference, yes, sir.

Q Let me ask you this, were lineups, and by lineups I mean a number of persons are shown to the victim, were they in use in Nashville in 1965?

A Yes, sir.

Q They were?

A Yes, sir.

Q But there was none in this case?

A No, sir.

Q Are you aware that many lawyers and scientists who have studied the matter in regard to lineup consider it a much fairer and less suggestive identification procedure than the showing of one man to a victim?

A Yes, sir, that's why I chose—

Q Would you speak up, please?

A This is why that—I understand the fairness of a lineup, and this is why I did not have a lineup for there

[21]

could not be fairness given to this person.

Q You didn't have a lineup because a lineup would have been unfair?

A Yes, sir.

Q And you think what you did was fairer than a lineup?

A Yes, sir.

Q Now let me ask you this, what is the approximate population of the Metropolitan jail, inmate population?

A Well, there's differences. Its capacity, I would say, could hold approximately four to five hundred people.

Q How many is that?

A Four to five hundred, that's my guess. I don't really know.

Q Well, how many are in there on an average day?

A Well, that's different also.

Q Your best estimate?

A Around a hundred, I'd say.

Q And was that about true in 1965?

A I couldn't say.

Q Well now, how about the Juvenile Detention facility here in Nashville, what's the approximate—

A It's entirely different today than it was at that time.

Q Well, what was the approximate population of

[22]

that facility at that time?

A Well, it was very small, because they didn't have large quarters, and again, as far as number, I would have to more or less guess.

Q Well, give me your best guess.

A I'd say with girls and boys both, would be fifty would be their maximum.

Q Now Nashville is the home of the Tennessee State Penitentiary, is it not?

A Yes, sir.

Q So that you had a number of persons who you could have selected for a lineup in this case in 1965?

MR. DALE: If Your Honor please, this is direct examination. I will object to leading.

MR. MELTSNER: Well, I think under Rule 43(b), Your Honor, I'm perfectly authorized to use leading questions.

THE COURT: All right, go ahead.

THE WITNESS: I didn't think so at the time, no, sir.

BY MR. MELTSNER:

Q But did you go through the Juvenile Detention facility on August 16, 1965?

A We—yes, we conferred with the judge, and as far as trying to get someone of this young man's stature, which

[23]

there wasn't any available.

Q What judge?

A At that time, it was Judge Tatum.

Q Was any order entered of any kind in Judge Tatum's Court in this case concerning this matter?

A Of the lineup procedures?

Q That's correct.

A No, sir, there wasn't any order.

Q Did you ever inform Petitioner's attorneys that you had gone to Judge Tatum concerning the lineup?

A The District Attorney, no, sir.

Q Petitioner's attorneys?

A I didn't understand that, sir.

Q Did you ever inform Petitioner's attorneys in 1965—

A At that time—

Q —that you had gone—

A At that time, I don't think that he had an attorney, at the time we're speaking of.

Q Did you ever inform the attorneys that he had at trial?

He was represented by Mr. Looby and Mr. Williams at trial?

A That was at the trial.

Q And you know Mr. Williams and Mr. Looby?

[24]

A Yes, sir.

Q Did you ever inform them at any time that you had

gone to Judge Tatum?

A No, not that I can recall; they never asked me.

Q Did you testify at trial that you had gone to Judge Tatum?

A No, sir, never was asked.

Q And your testimony here today is that you went to Judge Tatum for the purpose of trying to find out if you could hold the lineup in this case?

A No. That's not what I said.

Q Would you then tell me what your testimony is?

A You asked me if at that time were we using a line-up procedure, which we were in 1965, and prior to that. We checked with the facilities of our Metropolitan jail trying to find, as far as, best, as far as stature, appearance, there weren't any available.

We also tried Juvenile Court, which that is where if we have a lineup, this is where we participate in the lineup is at the Juvenile Detention quarters, not at the police headquarters, so there was none available at Juvenile Court as far as appearance.

This is what we believe in. We try to get at least two people looking as much alike as possible.

Q So you recognized the lineup as a much fairer

[25]

procedure?

A Yes, but at this point, we—

Q That's my question.

MR. DALE: May it please the Court, I don't care what Rule 43(b) says, he can't argue with this witness, and he has to let him answer.

THE COURT: He has to let him finish if he has a further explanation.

THE WITNESS: In my opinion, we could not have a

fair lineup by having a person with young features and yet a large body, we could not have given him a fair lineup. In the jail would have been older features, and at the Juvenile Detention would have been way smaller people.

BY MR. MELTSNER:

Q Did you try and enlist any citizens to appear in this lineup?

A Sir?

Q Did you try and enlist any citizens to appear in a lineup?

A No, sir.

Q Now, captain, let me ask you this. Petitioner was arrested on the night of the 16th of August, or the early morning hours of the 17th, am I not correct?

A Yes, sir.

Q And the lineup was held on the morning of the

[26]

17th, is that correct?

A If you want to call it a lineup, yes, sir.

Q Or the identification procedures?

A Yes, sir.

Q So that your canvas of the jails took place the morning of the 17th?

A That's correct, sir.

Q And you do recognize that a full lineup would have been a fairer method of identification?

A Yes, sir.

Q In this case?

A If we can get a fair lineup, it is best.

Q That is standard operating procedure?

A Yes, sir, that is standard procedure.

Q Now, do you recall testifying at the trial in 1965 that an Officer Harold Woods told Biggers to say certain

words?

A Yes, sir.

Q Do you remember what those words were?

A I can vaguely remember, but I believe, shut up or I'll kill you.

Q And these words were spoken so that the victim, Mrs. Beamer, could hear his voice?

A Yes, sir.

Q So that she could decide whether or not he was

[27]

the man?

A She could identify his voice, yes, sir.

Q Let me ask you this. Why, as a police officer, with your many years of experience, why do you feel that the lineup is a more reliable procedure for identification than the sort of procedure which was used here?

MR. DALE: If Your Honor please, I'll object to that as—well, it's a question asking Mr. McDaniel what he feels. It also calls for a conclusion of some sort on his part. I think probably if rephrased, it—

THE COURT: Yes.

BY MR. MELTSNER:

Q Well, perhaps I can ask you on what basis you believe that the lineup is a superior and more reliable identification procedure than the one employed in this case, drawing upon your experience as a police officer?

A Well, let me—may I give an example, sir?

Q Surely.

A Say that we have a suspect that's redheaded, light features, light complexion. If we could have someone either in the build or a person that we know that looks—that's redheaded and also light complexioned, then we might put in blonde headed people, we will not mix—if this suspect is redheaded, we will not mix black, dark

brown haired people with redheaded.

[28]

When the person to identify says that the person that she wants to make a complaint about was redheaded, if we find two, three or four redheaded people who are there, approximately the same height, same build and all, and when you put them in a lineup, why then to me that is the true and fairest of all lineup procedures.

Q Now this crime had taken place about seven months before the identification, had it not?

A It happened in January, yes, sir.

Q And as I recall, it was at night?

A Yes, sir.

Q And there was a dimly lit hallway where the victim had been grabbed?

A That I do not know, sir.

Q Well, do you recall that the victim had identified the assailant as having a teenage voice, a young person's voice?

A I would have to look up her description; I can't recall it.

Q Do you recall how she described him physically, your best recollection?

A I would have to go to my notes, yes, sir.

Q Well, would you refer to your notes, please?

A All right, sir.

All right, sir, says his height was six feet

[29]

tall, a hundred and eighty poinds, he was dark hair, medium or—medium to dark brown complexion.

Q Now are you willing to tell the Court today that there was no one in custody in the city of Nashville on

August 17, 1965, in the morning, who had any of those traits?

A I'm saying that there wasn't. What I'm saying, we didn't have one at Juvenile Detention quarters that looked young in face with a big stature. We probably had one big in jail, but not young features.

Q And you probably had some people whose features were young, but who weren't that big, is that correct?

A I'm not saying that, no, sir.

Q Well, is that possible?

A Our interest—

Q Is that possible that you had someone with young features?

A No, I'm not saying it was possible.

Q Are you saying it was not possible?

A I'm not saying it wasn't possible. I would not know about it, but whether we had a large man with young features, I know we didn't have that.

Q Did you go to every person in the cell blocks? Did you look at every person?

A I called back to the officer or superior officer whoever was in charge at this time, I do not recall, and asked

[30]

them would they check their jail for a person of this description, which I do every time we have a lineup.

Q And you—

A Tell them what we want.

Q And you made no attempt to try to find someone in the community?

A No, I did not go outside of our building.

Q Let me ask you just one final question at this time. Mr. Biggers was arrested for the crime of loitering, as I recall, is that correct?

A Yes, sir, technical charge of loitering.

Q What was the character of the evidence against him for the technical charge of loitering?

A We had another complaint which he had already reenacted, and the loitering charge was more or less placed on him as a hold.

Q I see. Now this other complaint, was this a rape complaint also?

A Attempt.

Q And in other words, he was taken from the hospital where he was taken into custody to reenact the crime in front of another rape victim?

A No.

Q In front of a female who was claiming that she had been assaulted?

[31]

A No, sir.

Q Could you explain it then for me, because I'm not quite sure.

A This other victim was in the hospital, had been admitted to Baptist Hospital some two hours before Mr. Biggers arrived at the hospital himself.

Q This is the Hubbard Hospital?

A Hubbard Hospital, which he had multiple lacerations of arms and hands.

Q Now did you bring him to her for identification in the hospital?

A No, sir.

Q Well, how did he reenact the crime?

A He took the officers back to the home of this victim and showed them exactly what took place, where the woman was standing, how his arm went through the door, and so forth. The woman was not present.

Q The woman was not present?

A No, sir.

Q Now has the defendant ever been charged on this crime?

A Yes, sir.

Q Has he ever been tried on this charge?

A No, sir.

MR. MELTSNER: That's all I have.

[32]

CROSS-EXAMINATION

BY MR. DALE:

Q Captain McDaniel, why in the course of preparing a lineup do you not go outside of the jail or outside of Juvenile Detention to get people to stand in as members of the lineup?

A This is something that, as long as I've been an officer, it just never has been done. We never have put off anything as—on the nature of this which we'll have to, either by news media of some type, request somebody to come in. We've never done this.

Q Isn't it because you can't account for the whereabouts of the people in the community, and one of them might just as well be the guilty party as the person who is the suspect?

A I never thought of it that way.

Q But isn't that a possibility?

A It's a possibility.

Q And so therefore you use people whose whereabouts you can account for?

A That's more so, if they do pick out other than the suspect, then we do know that this subject was in custody.

Q A lineup or a showup, as Mr. Meltsner has called

it, can also be beneficial to an accused, can it not?

A Oh, yes.

[33]

MR. MELTSNER: Now, Your Honor, I'm going to object to the leading questions at this point.

MR. DALE: Now, may it please the Court—

THE COURT: I think I'll permit him to cross-examine him.

MR. DALE: Thank you, Your Honor.

BY MR. DALE:

Q Now, Captain McDaniel, you were in charge more or less of the identification procedures, the examination if you will, of Mrs. Beamer, is that—

A Yes, sir.

Q Is that an accurate statement?

A Yes, sir.

Q When Mrs. Beamer was brought to the jail, did the police suggest to her that this is the man who did it, we want your identification of him, we've got to have it to make a case? Was there anything of that nature said to Mrs. Beamer during the course of that identification procedure?

A No, sir.

Q Would you describe for the Court, please, exactly what took place that night to the best of your—on that afternoon, I believe it was, to the best of your recollection?

A Mr. Biggers was in custody and at police headquarters. He was located in the detective bureau, in the office of Dr. W. J. Core, who is now deceased. When Mrs.

[34]

Beamer was brought to headquarters, she was placed in the office now occupied by the sergeant of the detectives,

which Dr.—as far as directions, I will say Dr. Core's office is on the east side of the building, the sergeant's office on the west side of the building, which is not directly across from the office, but across the hall, but it's across the hall and a room down.

Q Would you say it's diagonally across the hall from—

A Yes, but you cannot stand and look in one office to the other; it's that far down.

Q I see.

A Mrs. Beamer, which there was another woman also in the room, plus myself.

Q Excuse me, captain, was this other woman also a victim of somebody?

A I've been trying—I didn't make any notes of it, and I can't truthfully say.

Q Can you answer this, do you recall her having said anything during the course of the identification that Mrs. Beamer made of Mr. Biggers?

A I can't—

Q Okay, if you can't.

A I do not know who she was or—but I do know she was in there.

[35]

Q Okay. Excuse me, you were at the point—you had Mrs. Beamer and this other woman unidentified in that room. Now, if you will, proceed from there, please, sir.

A That is when I instructed Mrs. Beamer what was to take place. I told her that there would be a person to walk down the hallway. If she could identify this person when he walked by the door and then proceeded back through again, which one side and down, and then when he come back, she could see the other side, that way he was led by two detectives which—

Q You say led by two detectives, you mean preceded, held on the arm, handcuffed to, or what do you mean by that?

A No, had one in front of Mr. Biggers and then one detective in the rear.

Q Were both of these gentlemen—

A Just like three men, one behind each other.

Q Were both of these detectives in civilian clothes?

A Yes, sir.

Q Were they both colored?

A Yes, sir.

Q Go ahead, sir.

A Which, as they passed, and they come back, proceeded back to the room, then the officers come—Sergeant

[36]

Woods and Officer Bailey come back to the office where Mrs. Beamer was, and Mrs. Beamer—and then we asked her did you recognize anybody, and she said, yes, that was the person, the one, the biggest one was the one that had raped her.

Q Now is Sergeant Woods a fairly good-sized individual?

A Yes, sir.

Q How about Officer Bailey?

A Bailey is a medium—he's tall, but he's not quite as big.

Q Okay. Now you say Mrs. Beamer said, yes, I recognize the biggest one?

A Yes.

Q All right. Now did she say anything else at that point?

A She said, I would also like for him to repeat these words, which I think, shut up or I'll kill you, to try to see if I could identify his voice. I walked out of the office and

go and tell Sergeant Willis to bring Mr. Biggers to the doorway and have him repeat this. Then I step back into the room where Mrs. Beamer is, and when he comes to the door, he's facing her, facing both of us, and which Sergeant Woods then instructs him to repeat these words, which he did. Then he goes back to the room that he had just come out of, and Mrs. Beamer says, yes, she identified the voice also.

[37]

Q Now there was also a chance, I suppose, in this type of identification procedure that she could also say that was not the man, is that not possible?

A That's possible.

Q Has that been done on occasions in your experience?

A Yes, I've had procedures like this before, and no identification.

Q Do you know of your knowledge whether Mrs. Beamer failed to identify a number of people that were brought before her or before whom she was brought?

A Yes, sir.

Q Had she ever identified another person?

A No, sir.

Q Now on this loitering charge, if I understand your testimony correctly, this was simply a technical charge to enable you to hold Mr. Biggers pending the investigation of the Beamer case?

A No.

Q Oh, excuse me. Go ahead and explain it.

A No, at the time the loitering was placed against him, which was placed at the Hubbard Hospital, this was a technical charge to hold him pending the complaint that happened that night, August the 16th.

Q The very night that he was brought in?

[38]

A Yes, sir.

Q And the night preceding the morning or the day that Mrs. Beamer identified him?

A And then the next day, by him being the description, general description that we had had several complaints, that is why we started calling these people in to view Mr. Biggers.

Q On what basis, Captain McDaniel, would you say it was fairer in this case to have—and I'll use Mr. Meltsner's term—to have a showup as compared to a lineup? In other words, a showup where you have one person?

A Well, this was strictly my—I say—well, my decision, which I couldn't—to me, this was the most fairest—I couldn't have put him in the Juvenile Detention quarters with small boys, to me that would not have been fair.

Q Can you say without qualification that you in fact considered the fairness of the lineup procedure in this particular case?

A As long as I've been in the detective department, which is 1955, I have never tried to make any suggestive matter, either orally nor by any lineup. I do not—

Q Now—excuse me.

A I do not like that, I want to be fair either way.

Q Can you then say—I'm sorry, I keep interrupting

[39]

you.

A I'd rather see them tell me, no, this is not the person, than put in some suggestive matter.

Q Did you vary from that practice in the case involving the State of Tennessee v. Ardhie Nathaniel Biggers?

A No, sir.

MR. DALE: I think that will be all, if Your Honor please.

REDIRECT EXAMINATION

BY MR. MELTSNER:

Q Captain, you are being very tolerant of all of these badgering lawyers, especially me. I have just a few more questions here.

First of all, you mentioned that Mrs. Beamer had been shown other suspects in the several months after the rape.

A Yes, sir, several suspects.

Q Had you brought her down to the police headquarters?

A Yes, sir, she's come to police headquarters, and we've carried mug shots to her on numerous times, and I'm sure at some occasions, investigators have just picked up a suspect off of the street and carried to her, her home.

Q And showed them to her?

A Yes, sir.

[40]

Q There?

A Yes, sir.

Q So she is a permanent resident of Nashville, is that not correct?

A Yes, she's—as far as I know.

Q And she's been freely available to the police department and cooperative in this case?

A Yes, sir, real cooperative.

Q Now you mentioned the technical charge of loitering and I'm not quite clear about what that means. Is it a fair statement to say that he really wasn't loitering, but this was a charge put on to hold him?

A That's a charge at that time—which we do not use it today—but in that year, why we were just like a vagrancy, on juveniles, we would use the term of loitering, and on the adult, we would use the charge of vagrancy.

Q And you used a charge of loitering even though he was taken into custody while he was receiving medical treatment?

A That's right. We could have charged him with the curfew law, which we had at that time, but we did not.

Q You could have charged him with a violation even though he was with his mother?

A He wasn't with his mother.

Q Did you pick him up at the hospital?

[41]

A No, I didn't personally.

Q Now let me ask you this, you stated that you made this decision about holding the kind of identification proceeding that was held in this case. Were you guided by any rules or regulations of the department which specifically deal with this matter?

A No, sir. We have—like I said, we've used this method before, and we've used lineup procedures which I've always stated was to me the most fairest, if we can get the general build, and I've had it both ways. I've had them say, yes, this is the person; no, this is not the person, and especially in checks, bad check writing, we've used one person showup, as you refer to it, very successfully.

Q So you use a great number of showups?

A During that time, yes, sir. Not today.

Q Would you say that showups were used more often than lineups?

A No, sir.

Q Lineups were used about the same as showups?

A More, I would say.

Q Let me ask you this. Do your notes reflect the time of this identification?

A This identification was—I don't have it down, but it was made—I'd say right in the afternoon, early afternoon.

[42]

Q Around noon or thereabouts?

A Yes, sir, I'd say twelve to one o'clock.

Q And am I correct in stating that Archie Nathaniel Biggers was dressed in the same clothes that he was wearing when he was brought in?

A Yes, sir, I'd say that. I'm not positive; I wasn't present when he was first brought in.

Q Well, he has informed me that he was wearing the clothes that he had worked in at a service station, and I just wonder whether you recall whether or not that was the case?

A Yes, sir, he worked at Red Ace Service Station which they had lapels showing Red Ace and also his—I think his——

Q These are workmen's clothes?

A Working clothes, khaki, I believe.

Q And Nashville police officers don't dress quite that way?

A No, I didn't say they were dressed alike, which these officers, Mrs. Beamer knew them, for they went and brought her up there.

Q I see. These two officers were the ones?

A Yes, I did not use them as lineup, could not use the officers and Mr. Biggers as a lineup, didn't want her to distinguish between whether the two officers were to be

[43]

used for she knew these officers.

MR. MELTSNER: Thank you. Thank you, Captain.

THE COURT: Now let me clarify one or two little matters.

The crime itself occurred on what date?

THE WITNESS: January the 22nd, 1965.

THE COURT: And when was the petitioner, the defendant in the state court, when was he first apprehended, taken into custody, or charged?

THE WITNESS: August the 16th, 1965.

THE COURT: August 16th?

THE WITNESS: Yes, sir, approximately 11:30 p.m.

THE COURT: And how was he dressed at that time?

THE WITNESS: He was—like I say, I did not see him at that time, but I'm pretty sure he had on the same clothing at seven o'clock the next morning when I arrived as he had on at eleven o'clock that night.

THE COURT: Well, what is——

THE WITNESS: When I saw him, he had on work clothing, which was——

THE COURT: Well, when he was in the showup, that's August 17th?

THE WITNESS: Yes, sir.

THE COURT: How was he attired at that time?

[44]

THE WITNESS: The same.

THE COURT: With work clothes on?

THE WITNESS: Work clothes on, yes, sir.

THE COURT: And that had the Red Ace on it, you say?

THE WITNESS: Yes.

THE COURT: Service station?

THE WITNESS: He worked for Brooks Red Ace Service Station.

THE COURT: How was he described at the time of the crime as far as the witness——

THE WITNESS: As far as dress?

THE COURT: Yes.

MR. DALE: If Your Honor please, this was seven months before, unless you're referring to the second——

THE COURT: The crime was January 27, 1965?

MR. DALE: Yes, sir.

THE COURT: Did she testify how he was dressed at that time?

THE WITNESS: Let me——

MR. MELTSNER: I don't believe the state record says anything about that.

THE COURT: All right.

MR. DALE: She is here, if Your Honor please, and we'll——

[45]

THE COURT: She's going to testify?

MR. DALE: Yes, sir.

THE COURT: All right.

THE WITNESS: She gave a statement at that time, on January the 22nd, if I can just glance over this, she might have——

THE COURT: This occurred at night in some apartment house, is that right?

THE WITNESS: No, this occurred——

THE COURT: Tenement house, apartment house, or what was it?

THE WITNESS: She was at her home, sir, and was taken from her home out down the railroad track near the intersection of Alpine Street, this is where it happened.

THE COURT: Taken from her home?

THE WITNESS: Yes, sir. Her young daughter was

present and more or less the scare he placed on her that if you didn't make your daughter quit screaming, I'll kill her, and then he led the woman out the door.

THE COURT: All right.

BY MR. MELTSNER:

Q The daughter was present at this identification proceeding?

A Well——

[46]

Q She was present at that time?

A Sir?

Q The daughter was present in August at this identification proceedings?

A No.

Q She was not?

A No, she was not present.

Q Did she not testify at the trial that she could not identify Mr. Biggers as the rapist?

A I'm not familiar with that, but I believe I heard someone say that.

Q If the record revealed that——

A If the record shows it, that's what happened.

Q And that would be generally true about your testimony. You certainly had a much better recollection of all of these events at the time of trial, did you not?

A See, I couldn't sit in the trial, I don't know what each one of them testified.

Q I see, but as to your own testimony, you surely had a fresher view on the matter at that time, did you not?

A Oh, yes, sir.

MR. MELTSNER: Thank you.

THE COURT: All right, that's all.

WITNESS EXCUSED

THE COURT: Call your next witness.

[47]

MR. MELTSNER: Dr. Pollack.

(The witness was sworn.)

THE CLERK: State your name, please.

THE WITNESS: Irwin Pollack.

THE CLERK: Just have that seat.

MR. MELTSNER: Your Honor, I intend to present expert testimony, and I do intend to qualify him by asking questions about his background and degree, and after asking a few of these questions, I hope the Court will receive in evidence a curriculum vita.

THE COURT: What is his specialty?

MR. MELTSNER: He is an experimental psychologist.

THE COURT: Ask him a few preliminary questions.

MR. MELTSNER: Let me state for the record that Mr. Dale has a copy, and I believe agrees to it.

DR. IRWIN POLLACK,

a witness called to testify by and in behalf of the petitioner, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

Q Would you state your occupation?

A I am a professor of psychology at the University

[48]

of Michigan, and research psychologist in the Mental Health Institute at the University of Michigan.

Q Would you state briefly to the Court the nature of

your work as a psychologist and your field of specialization?

A I primarily carry out research in the field of auditory perception, hearing. I also teach in the department of psychology at the University of Michigan.

Q Now would you describe for the benefit of the Court some of your experience on committees in your specialty, and if you have consulted with government, any experiences doing that.

A Before I went to the University of Michigan, I worked for fourteen years for the United States Air Force where we worked primarily in the area of speech communication. I now serve on a working group of the National Academy of Sciences. It's called the Committee of Hearing and Bio-Acoustics which advised the Department of Defense with respect to questions associated with identification.

I'm presently spending most of my time on a research project of the National Science Foundation where I carry out fundamental research in the field of hearing.

Q Have you published in this field?

A Yes, I have.

Q Would you briefly describe some of your

[49]

publications?

A Most of my publications are in the Journal of the Accoustical Society of America. They number between ninety and a hundred, I would guess. They are concerned primarily with hearing and speech perception.

Q And have you conducted experiments?

A Yes, I have, for the past twenty-three years, and I am presently conducting experiments in this particular area.

MR. MELTSNER: Rather than continuing to bring out

Dr. Pollack's credentials, Your Honor, I ask that the statement of his background be introduced into evidence, and that he be qualified as an expert.

THE COURT: Yes, let it be admitted; he qualifies.

THE CLERK: Exhibit 2.

(PETITIONER'S EXHIBIT NO. 2 was marked for identification and filed.)

BY MR. MELTSNER:

Q Now, Doctor, have you read a document entitled "Transcript of Record, Archie Nathaniel Biggers v. Tennessee," in the Supreme Court of the United States?

A Yes, I have.

Q And are you familiar with it?

A Probably not to the extent to which you lawyers peruse your documents, but I've gone through it in fairly

[50]

conscientious detail.

Q Thank you. On the basis of your reading of this document, were you able to form an impression as to the procedures underlying Mrs. Beamer's identification of Archie Nathaniel Biggers?

A Yes, I was.

Q Now——

MR. DALE: May it please the Court—excuse me, Mr. Meltsner—I don't know whether from reading that document anybody can form—unless he is trained in the law or in police work—can form an impression of identification procedures.

Now Dr. Pollack may very well be an expert in audio or bio-acoustical work and psychology and so on, but I don't see how, from a simple reading of the transcript, that he could form an impression and then testify as an expert on it as to an identification procedure.

MR. MELTSNER: Your Honor, I'm asking the witness to testify as to his opinion of the reliability of the procedures employed as revealed by this record. Now counsel has the opportunity on cross-examination to bring out anything he wants about the assumptions underlying his testimony.

THE COURT: Well, I'll go ahead and receive the testimony, and then I'll assess it at the proper time

[51]

and evaluate it.

BY MR. MELTSNER:

Q Would you state what opinion you have formed as to the reliability of the procedures underlying this identification?

A I am concerned with several aspects of the process of identification in this particular case. I believe it's called in the legal terminology sort of one-for-one on identification rather than an identification from among a lineup, and that is the particular aspect I'm most concerned about, but there are many other aspects which I've gleaned from the record which make me concerned with respect to this particular identification.

Q What conclusion have you drawn, based on this concern, as to the reliability of these procedures?

A I come to the conclusion that there are many factors which are prejudicial with respect to the defendant in this identification process as revealed by the transcript.

Q Now what aspects of the process have led you to that conclusion?

A I've already mentioned the one-for-one confrontation. I'm concerned with respect to the very long time lapse between the initial act and the time of identification.

May I consult with some notes that I made going through this, Your Honor?

THE COURT: Yes.

THE WITNESS: I'm also concerned that the defendant was identified as a suspect to the person making the identification, and that he was requested to utter a specific statement which had some obvious emotional connotations, and that the complainant was surrounded by police officers perhaps intent in finding for a particular suspect.

All of these things tended to—I would think, in my opinion, for the complainant to identify the particular subject as the subject in question.

BY MR. MELTSNER:

Q Now how would the one-on-one identification procedure lead to that tendency? In other words, what is it about the one-on-one identification procedure which leads you to conclude that there was a great deal of prejudice here?

A May I digress for just a second, Your Honor?

In experimental tests, we try to distinguish between what we call a forced choice procedure and the yes/no procedures. In a forced choice procedure, basically, the task of the subject is to pick one of several objects, in this case several persons, pick one of that group which is the most likely, and in the experimental laboratory, we always include one true case among several false cases, so that we can, in effect, test the veracity of the person making the identification.

[53]

So that is called forced choice. It has the very nice feature that we can, at the same time of giving the test, we can determine the accuracey of the identification.

But this of course is not possible in its true extent, although the lineup attempts to get this, that particular direction, because you are asked to make a choice, and it is

possible for the complainant to pick somebody other than the particular suspect at hand.

Yes/no procedure in the laboratory is a situation where the subject under question makes a judgment. Is this — has a signal been presented, has an object under investigation been presented, yes or no. It's easy to show that for a given signal, for a given object, you can get the person to say yes maybe ninety-nine percent of the time, or yes one percent of the time under the exactly same experimental conditions by just changing the conditions for payoff in this particular situation.

The case that is — I can try to illustrate this, this is the problem of a sonar operator on board a ship. He hears a signal, and he has to inform his captain whether indeed this is some enemy object there. Now if the conditions are that by reporting yes, he doesn't prejudice the integrity of his own ship, that is, no action has to be committed as a result of that directly, then he will report anything that's suspicious, so he will say yes more often, because it's much more important not to miss an actual target if a target appears than to say

[54]

yes when indeed there was no target.

On the other hand, if, as a result of his saying yes, the captain has to expose his ship immediately so that there is a grave danger that if — there's a grave danger if he says no — if he says yes, indeed there's no target, then he will be in a very dangerous situation.

Q Now, do I understand the burden of what you're saying as applied to this case, that procedures which suggest a particular result will tend to lead to a positive identification of the person presented?

A In the yes/no situation, this is indeed the case, yes.

Q Now you've mentioned some other factors which supported your general conclusion of unreliability, and I would like to comment about some of those. You mentioned the time lapse. How does the time lapse tend to produce an unreliable identification?

A We all know about the fallibility of human memory. One of the standard experiments in a general psychology course is, during the first lecture, perhaps in front of four or five hundred students, some act takes place in the midst of the lecture, and at the end of the lecture, or perhaps right after the act takes place, the students are asked to report what happened, and the discouraging thing here with a visual identification right in the midst of the student, often

[55]

in very dramatic circumstances, you'll get a hundred percent different answers.

The fallibility of human judgment, coupled with the fact that a very long time lapse was —took place in this particular case—I was not able to tell from the record whether the features of the voice that were identified by the complinant were brought out immediately upon her initial complaint or only in the subsequent testimony.

Q Well now, with respect to this reliance on the voice, why does reliance on voice identification in a one-on-one situation of this sort tend to produce an unreliable identification?

A I'm sorry, could you please repeat? I was ——

Q Why does reliance on voice produce or tend to produce an unreliable identification? What is it about the voice that makes it particularly difficult as a means of identifying a person.

MR. DALE: If Your Honor please, I don't think that

the rule permitting Mr. Meltsner to lead applies to this witness, and I would therefore object to this.

THE COURT: Well, try not to lead him.

THE WITNESS: I'm concerned that in effect the subject's auditory memory of what was said changes with time. That is unlike a photograph which doesn't depreciate with time or disintegrate with time. Our

[56]

subjective memory of a particular auditory event does indeed decay with time so if you ask me what is it about the voice that relates to this long-term memory, it's the impermanence, if you will, of the mental copy of what was said, and so that—and we know from experiments that the fallibilities of identification will indeed increase with time.

BY MR. MELTSNER:

Q Have there been experiments done by you or other social scientists which support your conclusion?

A I have a bibliography of voice identification here. This was furnished to me by Professor Arthur House of the Department of Speech Sciences, Purdue. It contained approximately twelve references. Included among these references was a study which I have performed, perhaps the very first in this area, of voice identification under controlled, experimental conditions.

Q I'm not going to burden the record with that bibliography, but could you summarize the general conclusions of the authors there?

A The general conclusions?

Q About voice identification.

A Is that voice identification is a fallible form of identification, that is to say the accuracy of voice identification can achieve any one of a range of scores depending

[57]

upon the particular conditions under which it is examined, but it is never infallible.

Q Would you compare it in any way with something like fingerprints?

A Oh, there's nothing like—it has nothing like the specificity and integrity of fingerprints.

Q Would you say it has less specificity than physical identification?

A By physical, you mean sight?

Q Yes.

A I would tend to think that because so many more cues that might be available in visual identification, that visual identification would be somewhat more reliable.

Q Let me read you a statement, and then I'm going to ask you whether you find it correct.

"Where the identification is by voice alone, the absence of some comparison involves grave danger of prejudice to the suspect."

MR. DALE: If Your Honor please, I believe that's a quote right out of either Wade or Gilbert.

MR. MELTSNER: It's Palmer v. Peyton.

MR. DALE: Palmer v. Peyton, and I think this calls for more than an expert conclusion on the part of this witness. It's possibly a legal conclusion, and I therefore object.

[58]

THE COURT: This is out of a Supreme Court opinion?

MR. DALE: No, out of a Fifth Circuit.

MR. MELTSNER: No, it's a Fourth Circuit which the Supreme Court cited with approval in Stovall v. Denno.

THE COURT: Well, I'll let him answer.

BY MR. MELTSNER:

Q Did you find that statement to be correct?

A I feel there are certain legalistic aspects I am being called to answer, and to that extent, I disqualify but to paraphrase the statement in my own terms, to rely solely upon a voice identification, I would be very uncomfortable.

I base this on the simple testimony, when my daughter calls me on the telephone, I have two daughters, and I can't tell which one is speaking for quite sometime.

Q Your testimony, would it be any different, however, if there were no voice identification in this case, would you still conclude as you had concerning the reliability of this identification?

A With respect to the features of a long-time lapse, with respect to the features of a sort of one-on-one confrontation, with respect to the features of a subject being identified as the suspect, these are all factors that are not specific to voice identification, although voice identification,

[59]

I would feel, is unusually susceptible under these circumstances.

Q And these factors led you to what conclusion? Would you state your conclusion, if it were just based on those factors as to the reliability of the procedures?

A The procedures leave a lot to be desired. I should say that the procedures are open to question with respect to the absolute identification of a particular defendant in a particular situation. I don't wish to make any kind of comment with respect to the particular individuals concerned. I have no knowledge in this particular case.

Q Of course not. We're talking about the procedures, and your testimony is that those leave a great deal to be

desired, is that correct?

A That is correct.

Q Now I'm going to read a statement, and I would just like to have your comment on it, and this is from Wall's Treatise on Pre-trial Identification. I believe it was quoted in the Wade case:

"As bad as a showup is, there are a number of ways it can be made worse. One method is to point out the suspect to the witness even before the showup indicating his status as a suspect. If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the

[60]

manner in which the perpetrator of the crime is supposed to have acted or spoken."

Do you agree?

A Repeat that, please.

Q "As bad as a showup is, there are a number of ways it can be made worse. One method is to point out the suspect to the witness even before the showup indicating his status as a suspect. If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the manner in which the perpetrator of the crime is supposed to have acted or spoken."

A By showup, it's lineup?

THE COURT: Means one-on-one.

THE WITNESS: I entirely agree with the gist of that. I was hung up with respect to the showup, but these are features which indeed are prejudicial, I believe, to the proposed defendant.

THE COURT: We'll take a short recess at this time.

(Whereupon, a short recess was had, after which the following further proceedings were had:)

THE COURT: All right, proceed.

MR. MELTSNER: I just have a few more questions

[61]

of Dr. Pollack, Your Honor.

THE COURT: All right, sir.

BY MR. MELTSNER:

Q I would like to clarify this matter. You have testified that a lineup is a more reliable procedure than the one-on-one procedure used in this case.

Now suppose a lineup does not contain persons who look very similar to the suspect? Do you have an opinion as to whether it is still a more reliable procedure than a one-on-one identification? Do you have an opinion?

A Yes, I do.

Q And would you state it for the Court?

A I believe a lineup can be so constituted as to be very prejudicial to a defendant. For example, if the defendant has been identified as black, and the lineup consists of one black man and ten white men, I would think it would not serve a particulary strong selective role, but to the extent to which there is opportunity in the lineup of making confusions, it protects the defendant to the extent to which the complainant can pick out someone other than the defendant. There is no opportunity to do that under the one-for-one confrontation.

Q Now one final——

A There's an opportunity to make an error is what I'm saying relative to the particular defendant, particular

[62]

suspect in question.

Q There's an opportunity for an error in which procedure?

A There is an opportunity in the lineup procedure to

identify someone other than the suspect.

Q I see. Now again, just to clarify, and so there's no misunderstanding, you have testified as to the reliability of voice identification procedures. Assume for a moment that there were no voice identification procedures employed here, what would your opinion be as to the reliability of the identification procedure used?

A My opinion with respect to such factors as the length of time between the act and the identification, the one-on-one confrontation, the identification of the particular individual as a suspect, all of these might lead the complainant to identify a particular person under those circumstances.

MR. MELTSNER: Thank you.

CROSS-EXAMINATION

BY MR. DALE:

Q Dr. Pollack?

A Yes, sir.

Q Perhaps I misunderstood, according to the data that was given to me by Mr. Meltsner containing your accomplishments, et cetera, and qualifications, I note that you

[63]

are, and I would certainly not question your expertise concerning acoustics or audio or something of the kind.

A That's correct.

Q But now are you an expert on eyewitness identification, or would you consider yourself to be an expert on that?

A I would not consider myself to be an expert with respect to eyewitness identification. I would, however, if I could qualify that remark, however.

Q Certainly.

A I would feel that I could comment with respect to aspects of the procedure associated with any particular identification, that is, I don't feel I'm an expert witness because I have the power to pick out from voices a particular voice. I don't pretend this particular skill. I can only comment with respect to the underlying procedures associated with any identification situation.

Q But you do know the factors that one should consider or you think one should consider when identifying a person through voice or ——

A Many of these factors I would submit are identical in the case of visual identification. I don't pretend to be an expert in visual identification, but such things as the fallibility of human memory and things of this type are not specific to voice identification.

[64]

Q Is there not an optical memory and an audio memory?

A There indeed is. If you ask me which is more reliable ——

Q That is my next question.

A I would say that the visual memory is more reliable over a passage of time. If you ask me to make quantitative estimates, I would have to make blue sky estimates, but in any case, it's quite fallible.

Q Did you assume, in reading this transcript, that Mr. Biggers was identified by the rape victim only by voice identification?

A No, I—no. Let me answer that question.

Q To what extent, then, was there a reliance by, according to your reading of the transcript, was there a reliance by the victim on optical identification?

A I'm perhaps being asked to make a judgment that the jury was asked to make, and I feel uncomfortable in

this legalistic situation.

Q Let me read some language ——

A As I read the transcript, it seemed to me that the primary mode of identification here was auditory, and that was how I read the transcript.

If you ask me how the jury interpreted the particular set of evidence with respect to optical and auditory

[65]

identification, I can't answer that.

Q Well, let me read from the transcript a couple of lines, and I don't know how to get you to the right page on that, but this is Officer Bailey's testimony at the trial.

"Q But that was one of the ways she identified him, wasn't it?

"A No, she identified him by looking at him, and said he was the one.

"Q Once she looked at him, that was all by which she identified him?

"A No, he said something, but I don't know exactly what he said, sir."

On the next page, same questioner, same answerer.

"Q Had she identified him before he was ever asked to talk?

"A Sir?

"Q Had she identified him before he was ever asked to talk?

"A Yes, sir."

Now this is admittedly only the testimony of one person, and it relates to the pre-trial confrontation in the police station.

A Yes, sir.

Q But now, assuming that that is the fact, that

[66]

she did identify him by visual identification procedures as opposed to audio or voice identification, does that necessitate a reconsideration on your part?

A I don't think it necessitates a reconsideration with respect to the factors that give rise to a situation which is prejudicial with respect to the defendant. It does give rise to the problem that if visual identification is somewhat more reliable than auditory identification, then indeed this evidence should be weighted more ——

Q Then I——

A May I quote from one section which gives me the opposite impression?

Q Certainly.

A This is with respect to the direct examination of Mr. McDaniel. I'm sorry. Yes, Mr. McDaniel.

"GEN. HOLLINS: At any time, were you present when the Defendant was asked to talk?

"A Yes, sir.

"Q And what—when did that take place?

"A Right at that time when she iden——" and then he stopped—"saw him, she asked us to have him repeat a question which he repeated. That, and she also by voice, yes, sir."

The implication was that, as I read that, and I realize I'm not on this stand to be asked what my legal

[67]

interpretation of testimony is, but as I read that, it seemed to imply that the primary mode of identification was through voice, because once you had the opportunity for identification, visually, the officer specifically demurred from taking that line of approach.

Q Now you, I am assuming, are familiar with the

process of questioning and answering in a courtroom.

A No, I am not.

Q I meant to ask you, have you testified in criminal cases?

A I have never done that, sir.

Q I see. Well now, in a case of this kind, such as the transcript we're reading from, the prosecuting attorney will ask the question, the witness will respond, and then on cross-examination, the same procedure is employed. In this particular instance, the man whose testimony you just read preceded you on to the stand. He testified that she identified him by sight, and then asked that he be required to say the words, shut up or I'll kill you.

Now he testified under oath that that was what happened. Does that necessitate a reconsideration on your part?

A It necessitates a reconsideration with respect to the extent to which the entire mode of identification was by oral means alone; yes, it does.

[68]

Q In other words, I fully understand that you are not retracting your opinion that this situation is an unduly suggestive one?

A That is correct.

Q Is that correct?

A That is correct.

Q But is that accurate?

A That is correct.

Q But it does mean that your reliance on voice identification is perhaps, assuming this testimony to be true, is perhaps somewhat misplaced?

A I must go along with that.

Q All right, sir. Did you lean from your reading of the transcript that there was another woman victim in

the same room with Mrs. Beamer, the victim allegedly raped by Mr. Biggers, at the time this identification was made?

I'm not sure it appears in there, I'm not trying to trick you. I don't know if it's in the transcript.

A It seemed to me there was a lot of sparring among the defense and prosecution attorneys with respect to the possibility of mistrial if this matter came out before the jury, because that would prejudice the jury with respect to the particular defendant.

Q This happened to relate, if I may make this statement, this happened to relate to another person as opposed

[69]

to the woman who was seated in the police station with Mrs. Beamer at the time, but assume, as an expert on identification of this kind, that there is another woman seated in the same room with Mrs. Beamer at the time Mr. Biggers is brought to the door, or at the time he walks to the door. Now assume that Mrs. Beamer says, that's the man, and the other woman says, that's not the man, referring to an entirely different crime.

Does this necessitate a reconsideration of your statements as to the suggestivity, if that's a word, suggestiveness, of this situation?

A If I understand your line of questioning, what you're asking is, is this additional evidence to be considered in the pool of evidence with respect to the probability that the defendant indeed—or the suspect indeed——

Q I wish you had phrased the question for me.

A But certainly it's admissible with respect to the probability of involvement, but insofar as it improves the procedure of a one-for-one confrontation, I would submit that as such it does not improve that aspect of the pro-

cedure.

Q In that—excuse me.

A If you asked me if each of two witnesses independently corroborate each other with respect to a particular crime, if it is more likely that the defendant indeed is guilty of one of the two, then I would have to say yes.

[70]

Q But this is something that should be considered in the totality of circumstances with regard to this particular identification procedure, could you say that?

A I really must confess ignorance, Your Honor, because it seemed to me that the Court went to very great pains to separate these two cases as far as it's being prejudicial.

Q I tried to explain it to you, Doctor—excuse me one moment—the woman whose situation appeared in this transcript was not the woman seated in the police station with Mrs. Beamer. This is a hypothetical, to the extent that you are not familiar with it in the transcript.

I want you to bear that in mind. The lady that you read about, the other lady in this transcript, is not the lady seated in the police station. So you may dismiss that from your mind. This lady is another victim, seated with Mrs. Beamer, attempting to identify Mr. Biggers when he walks in the door. She says, that's not the man; Mrs. Beamer says, that is the man.

My question to you, hypothetical to the extent that you are not familiar with it, is does this indicate to you that the total picture was so suggestive as to lead these witnesses, these people who are attempting to identify this suspect, to say definitely that this is the man?

A If your question to me is that, is the total situation so suggestive that the particular complainant would

[71]

automatically identify the individual as the particular guilty party, so suggestive that she would automatically identify the particular individual as the guilty party, then I would have to admit that here is an example of a situation where another complainant in the same situation does not automatically identify him, so if the essence of your question is the overbearing suggestiveness of the situation so great as to automatically identify the individual, then indeed you have a form of—I think very weak—but a form of proof that it is not absolutely conclusive.

Q Now you mentioned something about ninety-nine times out of a hundred, or one time out of a hundred. Would you go through that for me one more time? Do you recall your testimony on direct examination?

A Yes, I probably goofed that up, but basically what I'm trying to say is that if I take a subject in a laboratory, and I set up a reward schedule so that I give them a dollar every time—when a signal appears, he says, yes, I heard a signal, but when a signal is not presented, and he says, yes, I hear a signal, I don't penalize him, then he will be saying most of the time, yes, I hear a signal, and he will continue to respond in this particular way.

On the other hand, if I balance this in the opposite way that I very heavily penalize him for saying, yes, when there is no signal, but I don't reward him very much when

[72]

he says, no, there was not a signal, I would get him to be responding in the other direction, and I could manipulate him all over the place.

This has nothing to do with the emotional suggestivity. It is the situation which permits me to get this kind of control over the subjects yes/no behavior.

Q I was certain in my own mind you were referring

to voice identification at the time.

A Yes.

Q That particular analogy is related only to voice identification?

A No, it is related to a very, very wide class of psychological experiences.

Q What is the reward system as it relates to voice and eyewitness identification?

A To the extent to which one—to the extent to which a given situation is far more accurate than another, then it is less amenable to this kind of manipulation, but if the situation is such as to provide uncertainty with respect to the basis of identification, then it doesn't matter whether it's voice, feel, sight, or any way you want to do an experiment.

I'm referring to sort of the decision structure of the person who has to make the judgment, and that's why the forced choice situation, where in effect the burden of proof

[73]

on him is to pick the one that is closest to the truth and then you can check his veracity permits the experimenter to make a check on the subject.

Q You have not, as I understand your testimony, examined Mrs. Beamer, the victim of the rape?

A No.

Q Nor of Mr. Biggers, the alleged perpetrator?

A No, I don't have any opinion with respect to the individual veracity of the individuals concerned.

Q Is it possible that Mrs. Beamer's audio memory or visual memory, if you will, exceeds that of the average?

A It is entirely possible.

Q I see.

A There's people that can remember visual events for

very long periods of time. They happen to be very rare.

Q Would it have a bearing on your testimony here today if you knew that Mrs. Beamer had viewed a number of people by themselves in a showup situation, if you remember how Mr. Meltsner explained it to you?

A Yes.

Q And did not identify any of them, and by a number, I would give you an exact number if I knew.

A I recognized this from the transcript, that is if I understood the transcript, Mrs. Beamer did not identify the first picture that was presented to her.

[74]

Q Or individual, not just picture.

A Or individual, I'm sorry. I couldn't tell from the transcript whether she had confronted any other individual other than photographs, but maybe it is in the transcript. I was unable to determine that, and I then have to go back to my statement with respect to a lineup. A lineup is better than a one for one confrontation, but if the individuals in the lineup are so dissimilar to what the general picture of the defendant is, I'm sorry, particular suspect is, then it would have very little to do, and so I can't comment with respect to how important it was that indeed Mrs. Beamer did confront other particular suspects if they indeed were very far from her, if you will, idealized picture of what the particular guilty party was like.

Q In a behavioral psychological sense, would that not indicate to you that here was a conscientious person attempting at least to designate the true perpetrator of this crime?

A I assume Mrs. Beamer is very sincere. I assume from the entire transcript there is no particular reason to single out a particular suspect in this particular case, and

she is doing, with respect to the best of her abilities, attempting to identify the perpetrator of her crime.

These are factors which I believe should be considered with respect to the extent to which the situation has

[75]

a degree of suggestivity, suggestiveness, that is if it were completely, overbearingly suggestive, that the individual must necessarily be the one selected, then all of this evidence that you bring up with respect to the fact that the particular suspect is not the first one she confronted, and she had gone through a number of photographs previous to this situation, say that indeed Mrs. Beamer is not acting rashly and groping at straws with respect to the first witness that she is confronted with, suspect she's confronted with, sorry.

Q Would it not also have affected your determination to know that she had not identified any person prior to this and then retracted the same? In other words ——

A I think these are statements which have to be weighed with respect to the probability of accuracy of her identification, yes, sir.

Q Would it not also affect your determination that she had not failed to identify this petitioner on the first time she saw him?

A I'm sorry, perhaps there's an extra negative.

Q Did not fail to identify him the first time she saw him.

A She did not fail —that means she did identify him on the first time she saw him?

Q Does that affect your determination?

A I will have to continue to say yes, these are

[76]

factors that would relate to the probability of her identification of a given individual.

Q Would not also the fact that there was no material discrepancies between the description that she gave the officers who answered the complaint and the actual description of this petitioner likewise have a bearing?

A I'm sure it must have a bearing. May I say I could not read from the transcript to what extent the initial description did indeed meld with——

Q I think you're right; I don't believe it's in there.

A I beg your pardon?

Q I don't believe it's in there.

A I don't believe it's in there to what extent she made an identification which later did jive with the characteristics of the individual so concerned.

Q Would not the fact that she had an opportunity to observe the individual who committed this crime also weigh in your calculation?

A If you're asking me if there was more light, would she have a better chance of identifying him, or if he talked more, she would have a chance of identifying his voice, or a hypothetical question of this type, I must assuredly say yes, the more the evidence, the greater the opportunity to make the identification.

[77]

Q Have you studied the effect of trauma on visual and audio memory?

A No, I have not.

Q So you're not prepared to say today that the undergoing of an experience of that kind could not cement in her memory her audio and visual memory the characteristics of the particular person who perpetrated the crime?

A I am not prepared to state an expert opinion, but I do have an opinion with respect to that particular aspect.

Q As long as we have qualified that it's not an expert opinion.

A That's correct, but I believe it's somewhat more educated than a completely lay opinion in that it results from thinking about the experimental literature, I believe the literature is very contradictory on this point. That is to say, I think there are certain traumatic events which indeed result in very long lasting memories. There are others which, as a result of the traumatic event, memories are almost completely wiped out, and therefore very unreliable, and it's very hard. You can't get it by counting case histories. It's very hard to balance whether it's more likely—traumatic to burn the particular event in the person's mind or on the opposite hand more likely that the traumatic event would result in a situation such as the person would actively forget it.

Q You've not stated an opinion; you've stated

[78]

what the split of authority is in your field.

A That's correct.

Q If I were to walk over and hit you in the jaw and say, you don't answer that question right, would you remember me seven months from now?

A I'm really not sure. I would like to answer obviously yes, but I'm really not sure. In the same way, if I were a defendant and someone pointed me out as having seen me, I would feel uncomfortable.

Q But we would take that as that is your opinion as contrasted with the mass ——

A The mass is not one way or the other. There are cases on either side where you burn in the traumatic experience and actively repress it, and it's a very difficult question to answer.

Q Just one more question. I believe I understood your testimony on direct that visual identification is more

reliable than voice identification.

A If you ask me to cite a particular experiment there, I probably could not. It is my impression that that is the case, and I just make that impression based upon sort of the totality of things available from just listening, from the case where under ideal circumstances, under ideal lighting and so forth, which I don't believe took place in this particular situation, is the case, but I will go along with that statement.

[79]

Q Are you an expert on the identification —the identification ability of other senses such as feeling?

A No, I am not, but I believe I could comment with respect to the procedures under which identification test is made, and I feel the same way with respect to visual and voice identification. I don't feel I'm an expert witness with any powers for voice, visual or any other form of identification, but as an experimental psychologist, I can testify as to the effect of the different factors of the situation relating to the accuracy of the particular identification.

Q All right. Now given in this situation that the light perhaps could have been better, that the voice identification possibly could have been a great deal more accurate had there been opportunity for further study of the voice, in your mind, is the combination of the two identification procedures, voice and visual, made under such suggestive circumstances that it would be impossible for Mrs. Beamer to have accurately identified this petitioner?

A I think I failed right at the end. If you're asking me was the situation such that it would have been impossible for her to make an accurate identification, I must say that the evidence from the transcript does not permit

me to make that statement. It doesn't permit me to make the statement whether she could have made an accurate identification —if there was sufficient information to make an absolutely

[80]

accurate or an absolutely inaccurate identification.

All I can say is the procedures under which she made the identification, I felt, were prejudicial with respect to the defendant.

Q Now perhaps you misunderstood me——

A I'm not trying to impeach her testimony.

Q I understand.

A I don't know the circumstances, and I don't pretend to know the specific events at the time except as revealed through the reading of the transcript.

Q I get then from the reading of your testimony, you're not saying that it would be impossible for this identification made by Mrs. Beamer to be accurate?

A It would not be impossible. If you are asking me is there a possibility that the particular defendant indeed is the guilty party, based upon the identification, of course it's possible. I'm in no way testifying——

Q You can't state to what extent it is not possible, can you?

A No, all I can say to what extent the particular procedures under which she identified him were prejudicial to the defendant, but I cannot say that there's a given probability based on the transcript that he indeed was the individual or not. I'm not making any judgment with respect to that.

Q So the variables then are really what Mrs.

[81]

Beamer actually remembers, aren't they, and her ability—

A The variables are the environmental situations under which she made the identification, the time lapse and things of this type. Yes, sir, these are the variables, as well as the integrity, the goodness of the original information on which she was making that judgment, and I gather from the transcript that there was very little light available for her to make a visual identification.

Q Now I only have one or two more questions, but suppose you have a man of Mr. Biggers' physical characteristics at age sixteen, which is some four years ago. He was approximately this same size, if not bigger, let us assume, weighing two hundred five, two ten, possibly more, I'm not exactly sure myself, and about the same height that he is now. He is arrested and charged with a crime, and at his age, he must be treated as a juvenile, he must be taken to Juvenile Court.

Assume further there are no juveniles presently detained in Juvenile Court or Juvenile Detention headquarters that even approach his physical characteristics, which is not hard to imagine. Some of them may be colored, they may have the same type of hair, but they will be substantially smaller, they will have a youthful face.

A All right.

Q Let's assume further that at the Nashville jail we have a hundred inmates. These are adults. They may

[82]

be over eighteen, there may be some that have the same characteristics, but they don't have a juvenile face.

If you were to arrange a lineup at that point, having people with his physical characteristics but with an adult

face, having juveniles who are smaller than he is but having a juvenile face, and having Mr. Biggers as one of those particular people, would that be a fair lineup?

A I've thought about that. It's clear that every time a particular suspect is questioned, if one has to, in effect, go out and find two brothers to make it a fair test, wouldn't that make the entire system very cumbersome?

I can't comment on the cumbersomeness of what this would require in law enforcement. In the ideal case, I would assume, extreme adherence to fairness in this case would slow down a—the particular enforcement process.

If you are asking me where I would draw a particular line with respect to when it's fair and when it isn't, I would say it must be very arbitrary, and I would certainly not feel I'm in the particular position alone of making that kind of judgment. I'm sure the law would have to consider this very carefully.

If you ask me what is the probability of getting five other black sixteen year olds weighing two hundred pounds, having youthful voices without much facial hair and all of the other characteristics that were mentioned, so that you could

[83]

have what might be considered a truly fair test, that that probability might be very, very small.

If you ask me where must the line be drawn, I think all I can say right now is it must be drawn in such a way as you do the best you can under the circumstances, and maybe the police did the best they could under the circumstances, but I'm not in any position to judge that.

MR. DALE: All right, thank you very much, Doctor.

THE COURT: Is that all of this witness?

MR. MELTSNER: May I ask just one more question with respect to that hypothetical?

REDIRECT EXAMINATION

BY MR. MELTSNER:

Q Let us suppose that the police do set up a lineup procedure in which a number of different persons share some of the attributes originally reported by the victim to belong to the criminal. Is that, as a procedure, more likely to be reliable than the sort of one-on-one procedure?

A To the extent to which the other individuals in the lineup do share these characteristics, I believe it's more and more fair, to the extent to which you can achieve some kind of ideal match among all of them at the same time.

Q That would be better?

[84]

A That would be better, but perhaps this is an ideal situation which is impossible to meet.

Q And a final question. Mr. Dale mentioned a number of assumptions about the record. I just want to get it clear. Have any of those assumptions changed your basic conclusion as stated on your direct examination as to the reliability of these procedures employed in this case?

A With respect to the reliability of the procedures, no.

MR. MELTSNER: Nothing further.

THE COURT: All right, Mr. Witness, that appears to be all.

WITNESS EXCUSED

MR. MELTSNER: I have no further need for Dr. Pollack's testimony. If Mr. Dale does not, would it be all right if he were permitted to remain in the courtroom?

THE COURT: So far as I'm concerned.

MR. DALE: Perfectly all right.

THE WITNESS: Thank you, sir.

MR. MELTSNER: I have just one more witness, and it will be very short, Your Honor. I would like to call Mrs. Hammonds.

[85]

FLORA MARIE HAMMONDS,

a witness called to testify by and in behalf of the petitioner, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELTSNER:

Q Mrs. Hammonds, are you related to the petitioner in this case, Archie Nathaniel Biggers?

A That's my son.

Q Was your son living at home with you in Nashville on the night of August 16, 1965?

A Yes, sir, he was.

Q And did he come home that evening?

A Yes.

Q Would you describe what happened when he came home?

A He came in and told me that he had fell getting over a fence, and that he had hurt his arm, and I told him he would have to go to the hospital, and I carried him to Meharry Hospital to see about it.

Q What part of the hospital did you go to?

A The emergency.

Q And what happened there?

A Oh, we was there, and they was treating the place on his arm, and then the police came in.

[86]

Q Now when the police came, was he receiving treatment?

A Yes, he was.

Q And how many police officers came?

A Oh, let me see, I don't remember, it was a good many of them. Oh, I'd say three or four, and there was a detective there also.

Q And what happened at that time?

A They said that they wanted to take him—wanted him to take them and show them where he had fell, and he carried them down there, because we followed him.

Q Where was it that he fell?

A On 18th and Scovel, right there at the end of the street going in home.

Q Is that near where you live?

A That's close.

Q And let me get this straight, what was your son doing when the police officers arrived at the hospital?

A When they arrived at the hospital?

Q When you first saw the police officers, what was your son doing?

A He was getting treatment for his arm.

Q Now after the police took him to this place on Scovel Street, what happened?

A They never did bring him home, they told us they

[87]

were going to bring him home, but they never did.

Q And when was the next time you saw him?

A About three or four o'clock the next morning we went up to the jail to try to find out where he was.

Q Now did you retain an attorney?

A Yes, I did.

Q What was the name of the attorney you retained?

A Z. Alexander Looby.

Q And do you recall about the time that you retained him?

A It was the next morning which would have been the 17th, and it was close to eight, around eight—it was somewhere around eight o'clock the next morning.

Q Now were you ever asked by the police at any time whether your son could appear in a lineup?

A No, I wasn't.

Q Were you ever shown a warrant?

A No, I wasn't.

MR. MELTSNER: Your witness.

CROSS-EXAMINATION

BY MR. DALE:

Q Mrs. Hammonds, what happened to him on the night of August 16th? I didn't catch what you said.

A He was coming home, and he said he fell coming

[88]

over a fence and cut his arm.

Q Did he elaborate on that to any extent?

A No, he just said the dogs got after him, and he fell coming over a fence.

MR. DALE: I have no further questions.

THE COURT: All right.

WITNESS EXCUSED

MR. MELTSNER: That is our case, Your Honor.

THE COURT: All right, call your first witness.

MR. DALE: Mrs. Margaret Beamer.

MARGARET FRANCES BEAMER,

a witness called to testify by and in behalf of the respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DALE:

Q Mrs. Beamer, would you state to the Court, please, ma'am, your address and occupation?

A 2319 Meharry Boulevard, and I'm a licensed practical nurse.

Q A licensed——

A Practical nurse.

Q Were you the prosecuting witness in the case of the State of Tennessee v. Archie Nathaniel Biggers?

[89]

A Yes.

Q During the course of that trial, were you asked to identify the defendant?

A Yes.

Q Did you at the trial identify the defendant?

A Yes.

Q Is this he seated at the counsel table?

A Yes.

Q Were you able at the trial to positively identify him?

A Yes.

Q Was there a doubt in your—was there or was there not a doubt in your mind?

A No.

Q At the time of trial?

A No, there was no doubt.

Q Could you speak up just a little bit?

A No, there was no doubt.

Q Do you recall, or do you not, the afternoon of August the 17th, 1965? Perhaps I should preface that by saying were you at the police station on the afternoon of August 17, 1965?

A Yes.

Q Did you at that time identify Mr. Biggers?

A Yes.

[90]

Q Now this was prior to the trial, was it not?

A Yes.

Q Would you describe to the Court from your best recollection what happened on that afternoon from the time you walked up on the floor and then just tell the Court what happened from that point on?

A I was escorted to a room and Mr. Biggers was walking by. Anyway, I was told they had some suspects, and if I recognized this suspect, just to look at him and see if I could recognize him, and they had him to walk past, and I was inside the room, and I could view him through the door, and I identified him.

Q Did you identify—did you or did you not identify him at that point?

A Yes, I did.

Q At what point? At what point during this procedure did he say anything, or if he said anything?

A No, I asked the officers to ask him to say something, and he repeated the words that he was asked.

Q Do you recall whether this was before or after you had identified him as the man who attacked you?

A That was after I identified him.

Q I want your best recollection on this, Mrs. Beamer,

did you identify him before he spoke the words or did you identify him after he spoke the words?

[91]

A I identified him before he spoke the words.

Q Do you recall why you asked the police officer to have him say something?

A Well, at the time I was attacked, he was talking, and he told me the same words that I had him to say, and during the time I was attacked, he talked.

Q Did police officers bring suspects out to your house after the attack and before this identification?

A Yes.

Q Do you recall how many?

A I know there was several; I'm not sure of the number, but——

Q More than two?

A More than two or three.

Q Did you go to the police station in addition and view other suspects?

A Yes, I did.

Q Did you ever identify any other suspect?

A No, I didn't.

Q Did you look at pictures in addition?

A Yes, I looked at pictures.

Q Photographs?

A Yes.

Q Was this the first time after the attack, was this the first time you had seen Mr. Biggers?

[92]

A Yes.

Q Do you recall how you described Mr. Biggers to the police officers who answered your call in which you informed them of the attack?

A As well as I can recall, I described him as being a teenager, and I'm not sure, but I think I gave the age between sixteen and eighteen, and I gave his weight, I'm not sure, but I think around a hundred and eighty and two hundred pounds, dark brown.

Q The complexion dark brown?

A Dark brown complexion, and I said he had kind of bushy hair, his hair was kind of—you know, not an Afro they're wearing now, but kind of bushy, and height I gave around five ten and six inches—six feet rather, I'm sorry, five ten and about six feet tall.

Q Do you recall whether you said anything or not pertaining to the type of skin that he had?

A On the face had a smooth kind of complexion, not like a man that shaved a lot, and the voice was the voice of a young teenage boy before they get—you know, reach adulthood where the voice get very deep.

Q The attack that we're talking about took place of course in your home. Would you describe, as best you recall, the lighting in the area of your home where he first attacked you?

[93]

A Where he was first attacked, the light was—there was no light in the kitchen. I was grabbed in the hallway and pulled into the kitchen. He was in the kitchen, and I was coming out of one room, and was in the hallway, coming out of a lighted room, and he was in a dark room with no light.

Q Were there lights on in other rooms?

A Lights on in the other rooms, but not in the kitchen which the hall was dimly lit from the lights from the other three rooms.

Q Did you see his face?

A Yes.

Q Mrs. Beamer, had you not seen Mr. Biggers in the police station on the afternoon of August 17, 1965, could you have identified him in the courtroom during the trial?

MR. MELTSNER: Your Honor, that I will just have to object.

THE COURT: That probably is a little too speculative.

MR. DALE: If Your Honor please, if we can't answer that question, then I'm not sure if there is any way we can meet one of the tests.

THE COURT: What was the question? If she had not seen him at pre-trial ——

MR. DALE: Could she have identified him independently of the pretrial confrontation is essentially

[94]

what it amounts to, and how I can ask that is another question.

THE COURT: What test are you talking about?

MR. DALE: I was looking for it.

MR. MELTSNER: If I may say, Your Honor, my understanding of that is as a legal test depending on certain objective circumstances, but not a witness' statement four years after the event she could have done something. It seems to me ——

MR. DALE: May it please the Court —excuse me, go ahead.

MR. MELTSNER: It seems to me to be too speculative to merit consideration on the point.

MR. DALE: I will attempt some objective questions if you will bear with me just a moment.

THE COURT: You may reach it in some more objective manner, concerning the pre-trial identification.

BY MR. DALE:

Q Mrs. Beamer, I'm reading from the transcript of the testimony at the state trial, and in response to a question by General Hollins, the prosecuting attorney:

"Q Are you telling this jury today that you have any doubt about this? Or do you have any doubt about this?

"A No, I don't have any doubt."

[95]

Would you tell the Court, please, ma'am, what you meant by that, if you can recall?

A That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe——

Q You say when you first laid eyes on him, which time are you referring to?

A When I identified him—when I seen him in the courthouse when I was took up to view the suspect.

Q All right. Now let me ask you this question. The Court in this case asked you this question:

"THE COURT: All right. Is there any doubt in your mind?

"A No, there's no doubt."

Now what did you mean when you said, "No, there's no doubt."?

A No doubt in my mind would mean that if I had any—was unsure, that this was not the individual, there would be some doubts, whether I would know whether this was the one or not the one. I had no doubts, because I was sure that this is the one.

Q Were you or not identifying him in the courtroom

as the man who attacked you?

A Yes.

[96]

Q Was there any doubt at the time you testified that he was the man who attacked you?

A No.

Q On what basis can you tell the Court that you have no doubt that this is the man who attacked you, by what reason?

A He had the same face, this is the same man that attacked me, because he looks the same, the same face, the same build, the same color, the same hair, and the same age when I viewed him.

MR. DALE: If Your Honor please, I don't see how we can escape the necessity of some suggestive testimony on the point that I mentioned.

THE COURT: Well, she's already testified that she had no doubt. What more can you add to that? And she said what she based her testimony on.

MR. DALE: All right, sir.

THE COURT: Any identification testimony is based upon some subjective element, the appearance and observation.

MR. DALE: That's all. All right.

THE COURT: All right, any cross-examination?

MR. MELTSNER: Yes, sir.

[97]

CROSS-EXAMINATION

BY MR. MELTSNER:

Q Mrs. Beamer, you had never seen Mr. Biggers before the alleged attack, had you? He was a stranger to you?

A That's correct.

Q And you had never seen him until August 17th, after the attack?

A That's correct.

Q And you mentioned when questioned by Mr. Dale that you identified him before he spoke?

A Yes.

Q Well, am I correct that you asked the police officers to have him speak?

A Yes.

Q And then what did he say?

A Words to this effect, shut up or I'll kill you.

Q And his voice sounded like the voice of the rapist?

A That is correct.

Q And so you were more certain in your identification, because you heard his voice?

A (Witness nods head).

Q May I have an answer?

A Yes.

Q And did you ask the police officers to have him

[98]

speak as soon as you identifed him after seeing him?

A That is correct.

Q Now you said that the officers mentioned that they had a suspect that they wanted you to see. What did you understand them to mean by the word "suspect"?

A Suspect, in this instance?

Q Yes.

A Someone to come—someone for me to try to see if this was the individual.

Q Did you think they had any evidence against him?

A I don't know.

Q You don't know?

A No.

Q Now I understand your testimony to be that during this seven-month period, you saw a number of persons, some were brought to your house, other suspects, is that correct?

A That's correct.

Q Will you describe how that would work, a police officer would bring a man to your house, is that it?

A They brought men to the house, they brought pictures, at times I went down to the police station—or either to my house, they brought individuals by my house.

Q Now, did they bring them one at a time?

A One at a time, yes.

Q And they would bring them to your house and ask

[99]

you whether this was the man?

A Yes.

Q One at a time?

A Yes, that's the way.

Q When you went to the police station, would you go to the homicide division and sit in a room as you did on August 17th?

A I'm trying to think how——

Q You have difficulty recalling that?

A Because at different times it occurred in different manners.

Q Well, did they just—but basically was there a procedure to bring somebody and ask you whether this was the man?

A No, at times they would have lineups.

Q What kind of lineups would they have?

A Oh, I'll say about four or five men, all dressed alike.

Q And this was —this occurred at the police station?

A That's correct.

Q But when they would bring people to your house, they would bring a man by your house and ask you whether this was the one?

A Correct.

[100]

Q Now, do you remember everything just as clearly now as you did four years ago?

A No, I don't remember everything as clearly.

Q And so you might have meant things differently when you testified in 1965 than you recall them now. That is possible, isn't it?

A I don't know.

Q You don't know whether it is possible.

Now at trial, as best you can recall in 1965, did you get down off of the witness stand and point this man out as the assailant?

A No, I didn't get down off of the witness stand.

Q Did you stand up and point a finger at him?

A Not point a finger.

Q As best as you recall, did you ever say, oh, that's him, the third person on the right, or something like that? Did you ever identify him in that manner?

A I was asked to identify him. I can't recall whether I pointed my finger, but I was asked if that was the man, and if that is him over there, and there was some way that I indicated that Mr. Biggers was the individual.

Q And he was the man who you saw on August the 17th?

A That's correct.

MR. MELTSNER: I have no further questions.

[101]

THE COURT: All right.

MR. DALE: I have no further questions.

THE COURT: All right, that's all, you may step down.

WITNESS EXCUSED

MR. DALE: Officer Bailey.

FLOYD BAILEY,

a witness called to testify by and in behalf of the respondent, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DALE:

Q Mr. Bailey, would you tell the Court, please, your occupation?

A Member of the Metropolitan Police Department; work in the CID division.

Q CID is what?

A Detective division.

Q Detective division?

A Yes, sir.

Q Were you in that same division in the summer of 1965?

A I was.

Q Did you work on the case of State of Tennessee

[102]

v. Archie Nathaniel Biggers?

A I did.

Q At that time, I don't believe it was named such a case, but you were involved in the investigation of a crime

at that time he was alleged to have committed, is that correct?

A I was.

Q Mr. Bailey, you testified at his trial, I believe, did you not?

A I did.

Q Do you remember the circumstances around the afternoon—or do you remember the circumstances of the afternoon in which Mrs. Beamer identified him as the man who attacked her?

A I do.

Q Would you describe those circumstances to the Court, please?

A Mrs. Beamer was picked up by me and my partner and brought to headquarters, placed in a room, and Biggers was brought down the hall, the full length of the hall, and carried back.

Q By brought, what do you mean?

A My partner and I escorted him down the hall.

Q Was he handcuffed or——

A No, he wasn't.

Q Did you have hold of his arm or anything?

[103]

A No.

Q Were you in the room in which Mrs. Beamer sat at the time she identified him?

A I was at the door of the room she was in.

Q Did you hear anything that went on, or did you hear the conversation that went on in that room?

A Yes, I did.

Q Was there another lady in that room?

A It was, but I don't remember who she was.

Q Do you recall whether or not she was the victim of

another attack in that—in Nashville?

A I don't remember.

Q You don't remember?

A No.

Q Now, do you remember the circumstances around Mrs. Beamer's identification of Mr. Biggers?

A I do.

Q Would you tell the Court what happened then?

A When she saw him, she said that was the man that attacked her, and then she asked someone to have him repeat some words.

Q Did he then repeat them?

A He did.

Q Is there a—can you say without question that she identified him before he was required to speak the words?

[104]

A She did.

MR. DALE: That's all.

CROSS-EXAMINATION

BY MR. MELTSNER:

Q Detective, just for the record, would you state your age?

A Pardon?

Q Your age?

A Forty-eight.

Q And your height?

A Five ten and a half.

MR. MELTSNER: Thank you.

MR. DALE: That's all.

WITNESS EXCUSED

MR. DALE: That's all of the evidence for the State, if Your Honor please.

THE COURT: All right. Now do you want to argue orally, or do you want to submit it on briefs?

MR. MELTSNER: We've submitted what we think is a fairly complete brief, but we would like the opportunity to file a supplementary memorandum.

THE COURT: All right, how long do you want for that purpose?

MR. MELTSNER: Ten days.

[105]

THE COURT: Will that be sufficient for you?

MR. DALE: Yes, sir.

THE COURT: All right, ten days then for filing supplemental briefs.

MR. MELTSNER: I don't wish to take up any more of the Court's time than is necessary, but I would like to make a few general observations.

THE COURT: All right, go right ahead.

(Whereupon, oral argument was made by counsel for the respective parties.)

THE COURT: All right. Well, I will take this case under advisement, and when I receive the briefs, of course I will go over it carefully and see if there is any basis for relief, and you want ten days, both parties, you think that will be sufficient, and if you need to reply, then five days after that, either party may reply to the other brief.

MR. DALE: All right, sir.

MR. MELTSNER: Your Honor, one more thing, with respect to Mr. Williams' request, he asked about the petitioner remaining in Nashville, and I asked Mr. Dale, and he said he had no objection to it.

THE COURT: Let the order provide for that. Where is he in confinement?

MR. MELTSNER: Presently at the state penitentiary.

[106]

THE COURT: Where was he prior to that?

MR. DALE: Brushy Mountain.

THE COURT: I see no reason why he shouldn't stay here pending the disposition of the case.

MR. MELTSNER: Thank you, Your Honor.

THE COURT: All right, adjourn Court.

(Whereupon, Court was adjourned.)

[108]

REPORTER'S CERTIFICATE

I, Georgella Mankin, Official Court Reporter for the United States District Court, Middle District of Tennessee, with offices in Nashville, hereby certify that I recorded in machine shorthand all of the proceedings had in the case of Archie Nathaniel Biggers v. Lake F. Russell, Warden, Tennessee State Penitentiary, Civil Action No. 5120, on the 4th day of November, 1969; that these proceedings were reduced to typewriting by me; and that the foregoing is a true and accurate transcript of the said proceedings.

This the 24th day of May, 1970.

/s/ Georgella Mankin
Georgella Mankin
Official Court Reporter

[fol. 1] PLAINTIFF'S EXHIBIT NO. 2
FILED: November 4, 1969
CASE NO. 5120
BRANDON LEWIS, CLERK
BY /s/ Guy W. Cooper

CURRICULUM VITA
IRWIN POLLACK

September, 1968

NAME: Irwin Pollack SEX: Male
DATE OF BIRTH: April 10, 1925 PLACE OF BIRTH: Bridgeport, Connecticut

MARITAL STATUS: Married

WIFE'S MAIDEN NAME: Marcille Kaufman

CHILDREN'S NAMES: Sharron, Phyllis, Stanley

EDUCATION:
University of Florida, B. S., 1942-1945
Harvard University, M. S., 1945-1946
Harvard University, Ph.D., 1948-1949

POST GRADUATE TRAINING:
National Sciences Foundation Senior Postdoctoral Research Fellow, Applied Psychology Research Institute, Cambridge, England, 1960-1961.

APPOINTMENTS:
Research Assistant, Psychoacoustic Laboratory, Harvard University, 1946-1948.
Research Psychologist, U. S. Navy Electronics Laboratory, 1949.
Research Psychologist, Supervisory Research Psychologist, Director, Senior Research Psychologist Air Force Operational Applications Laboratory (GS-11 to PL-313 to GS-15), 1949-1963.

Research Psychologist, Mental Health Research Institute, Professor of Psychology, Department of Psychology, University of Michigan, 1963-present.

TEACHING APPOINTMENTS:

Teaching Assistant, Harvard University, 1947-1948.
Lecturer, University of Maryland extension program, 1956.
Summer Session Lecturer, Massachusetts Institute of Technology and University of Michigan, 1962.
Professor of Psychology, University of Michigan, 1963-present.

CONSULTING POSITIONS:

Consultant to Society of Automotive Engineers, R-6 Committee on Aircraft Noise, 1967-present.

COMMITTEE ACTIVITIES:

United States of America Standards Institute
Chairman, Writing Group S3-W-33, Evaluation of Loudness of Noise
Member of Writing Group S2-W-49, Speech Intelligibility
Member of Writing Group S3-W-53, Talker Identification

National Academy of Sciences—National Research Council
Committee on Hearing and Bio-Acoustics (CHABA), Charter Member
Committee on Bio-Astronautics, Air Force Designated Member

Advisory Committee to Director, Psychobiology, National Sciences Foundation, 1965-1968.

MEMBERSHIP IN PROFESSIONAL SOCIETIES:

Member, U. S. Delegation to International Standardization Organization and International Electroacoustical Committee, Helsinki, 1961.

American Psychological Association
Acoustical Society of America
Psychonomic Society

EDITORIAL ACTIVIEIES:

Associate Editor, Perception and Psychophysics, 1967 to present.

Associate Editor, Organizational Behavior and Human Performance, 1967 to present.

HONORS:

Fellow, Acoustical Society of America, 1952.

Fellow, American Psychological Association, 1954.

U. S. Government Award, Sustained Superior Performance, 1955.

Supreme Court of the United States

No. 71-586 ----, October Term, 19

William S. Neil, Warden,

Petitioner

v.

Archie Nathaniel Biggers

ORDER ALLOWING CERTIORARI. Filed February 28 ---------- , 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

71-5[illegible]6

E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary, Nashville, Tennessee,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

BART C. DURHAM, III
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219
Attorney for Petitioner

Of Counsel
DAVID M. PACK
Attorney General

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

RESPONSE NOT PRINTED

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Constitutional, Statutory and Rules Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ:	
1. A 4-4 affirmance by this Court of a State's highest court is res judicata as to the same issue between the same parties in a future habeas corpus action	6
2. The resolution on the merits of the alleged unconstitutional identification is inconsistent with previous decisions of this Court	9
Conclusion	9

INDEX TO APPENDICES

Appendix

A. Biggers v. Neil, Warden, No. 20,540 (6th Cir. 1971) (opinion) A-1

B. Biggers v. Neil, Warden, Civil No. 5120 (M. D. Tenn., May 4, 1970) (Order) A-39

C. Biggers v. Neil, Warden, Civil No. 5120 (M. D. Tenn., April 17, 1970) (Order) A-46

D. Biggers v. Russell (Neil), Warden, Civil No. 5120 (M. D. Tenn., July 29, 1969) (Order) A-57

E. Biggers v. Russell (Neil), Warden, Civil No. 5120 (M. D. Tenn., May 12, 1969) (Order) A-58

F. Biggers v. Tennessee, 390 U.S. 1037 (1968) (Order denying petition to rehear) A-60

G. Biggers v. Tennessee, 390 U.S. 404 (1968) A-61

H. Biggers v. Tennessee, 388 U.S. 909 (1967) A-67

I. Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696 (1967) A-68

TABLE OF AUTHORITIES

Cases

Anderson v. Johnson, Warden, 390 U.S. 456 (1968).. 8, 9

Biggers v. Tennessee, 390 U.S. 404 (1968) 8

Coleman v. Alabama, 399 U.S. 1 (1970) 9

Durant v. Essex Company, 74 U.S. (7 Wall.) 107 (1868) 8

Etting v. United States Bank, 24 U.S. (11 Wheat.) 59 (1826) 8

Foster v. California, 394 U.S. 440 (1968) 9

Hertz v. Woodman, 218 U.S. 205 (1909) 8

Radich, Appellant v. New York, 401 U.S. 531 (1971) 8

Sanders v. United States, 373 U.S. 1 (1963) 8

Stovall v. Denno, 388 U.S. 293 (1967) 9

United States v. Pink, 315 U.S. 203 (1941) 8

Statutes

28 U.S.C., § 1254(1) 2
28 U.S.C., § 2241 3
28 U.S.C., § 2244 ..... 3, 6
28 U.S.C., § 2403 ..... 4, 6
Constitution of the United States:
Fifth Amendment 2
Fourteenth Amendment 2

Supreme Court Rules

Rule 23 ..... 4, 7
Rule 33 ..... 4, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary, Nashville, Tennessee,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The petitioner William S. Neil, Warden, Tennessee State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 18, 1971.

OPINIONS BELOW

Mr. Biggers' rape conviction was affirmed by the Tennessee Supreme Court, 219 Tenn. 553, 411 S.W.2d 696 (1967)(App. I). This Court granted certiorari, 388 U.S. 909 (1967) (App. H), affirmed the judgment below by an equally divided vote, 390 U.S. 404 (1968) (App. G), and

denied a petition to rehear. 390 U.S. 1037 (1968) (App. F). The United States District Court for the Middle District of Tennessee granted a petition for writ of habeas corpus in unreported orders (Apps. B-E) and the Sixth Circuit affirmed in an opinion not yet reported (App. A).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 18, 1971, and this petition for certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. What effect did this Court's equally divided affirmance of a state conviction after plenary consideration have upon subsequent District Court reconsideration, by collateral review in federal habeas corpus, of what Petitioner contends to be the identical issue presented to this Court?

2. Was Respondent denied a fair trial as a result of the use of identification evidence allegedly the by-product of an unconstitutional procedure?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

"§ 2244. Finality of Determination

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

Title 28, United States Code, further provides:

"§ 2403. Intervention by United States; constitutional question

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

The 1954 rules of this Court were in effect at the time of the certiorari grant (June 12, 1967). Rule 23, **The Petition for Certiorari,** remained unchanged in pertinent part by the 1967 amended rules, and was as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 33

"(2) (b) In any proceeding in whatever court arising wherein the constitutionality of any Act of

Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U.S.C., § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D.C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C., § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U.S.C., § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question."

STATEMENT OF THE CASE

The respondent Mr. Biggers was convicted of committing a rape at knifepoint which occurred in 1965. Seven months after the offense, while Mr. Biggers was being detained as a suspect in another rape case, the victim identified him as her assailant. The subsequent conviction based on that identification was affirmed by the Tennessee Supreme Court. This Court granted certiorari, heard oral argument, and affirmed the conviction by a four to four vote. Plenary consideration was given before this Court to all aspects of the identification question.

Shortly thereafter, Mr. Biggers filed a federal habeas corpus action. The District Court for the Middle District of Tennessee after an evidentiary hearing found the police station identification improper and voided the conviction. The Sixth Circuit affirmed, primarily because the judges who wrote the majority opinion thought the District Judge decided a different question than that presented this Court on certiorari. Judge Brooks in dissent felt that this Court had indeed decided the precise question so as to import finality in the matter.

REASONS FOR GRANTING THE WRIT

1. A 4-4 Affirmance by This Court of a State's Highest Court Is Res Judicata as to the Same Issue Between the Same Parties in a Future Habeas Corpus Action.

The Sixth Circuit incorrectly decided important federal questions in conflict with a specific previous ruling by this Court and, further, in conflict with a constitutional statute. The Court has so far departed from applicable law as to call for an exercise of this Court's power of supervision.

The District Judge ordered a new trial untainted by the identification procedures at the police station. The Court indicated that it would not apply 28 U.S.C. § 2244(c), *supra*, and if it did apply that statute, under the facts of this case, it might be unconstitutional (App. B). The Sixth Circuit did not mention this statute in arriving at its decision. It is the position of Petitioner that the statute does apply and both lower courts improperly disregarded it.

Pursuant to Rule 33(2)(b) of this Court, it appearing that 28 U.S.C. § 2403 may be applicable, three copies of this petition have been served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. No court below has certified that the constitutionality of 28 U.S.C. § 2244(c) was drawn in question.

The Court of Appeals majority opinion gave three reasons why it thought the identification matter could be adjudicated in federal habeas corpus despite this Court's previous affirmance. All three reasons are erroneous. They are as follows:

a) **The District Judge did not decide the same question as this Court did.**

It is said below that different facts were considered on federal habeas corpus than were considered by this Court on certiorari. The majority points to language in the petition for certiorari which mentions voice identification. Their conclusion that the certiorari grant was so very narrow overlooks Rule 23 of this Court which says that the statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

Specifically, the argument is that this Court considered only voice identification, whereas the District Court considered the totality of the circumstances. With the exception of certain language heretofore noted respecting voice identification in the certiorari petition, the parties in their briefs, oral arguments, petition to rehear, and again in the court below, have always given plenary treatment to the identification question.

The District Judge sought to avoid the adjudication by this Court by saying that the voice identification took place during a show-up and since he found the show-up procedure unconstitutional, he need not reach the voice identification. Yet implicit in this Court's affirmance of the State conviction was the fact that it was necessary for this Court to consider the constitutionality of the former in order to adjudicate the latter.

b) **Res judicata does not apply in the usual sense under the facts of this case.**

This was the second reason the Sixth Circuit gave in affirming the District Judge. It is true that res judicata does not apply to a federal habeas corpus action. Subsequent decisions may be retroactive. New evidence may

be discovered. The Sixth Circuit was correct in stating the general principle but applied this principle improperly. It should have been persuasive to the lower courts that a constitutional claim that has been thoroughly thrashed out as was the case here has been settled. There should be finality between these two parties at least with respect to this issue. **Sanders v. United States**, 373 U.S. 1 (1963).

c) **The equally divided affirmance means only that the judgment below remained in effect.**

The majority said, "As we read these decisions, the equally divided vote of the United States Supreme Court in **Biggers v. Tennessee**, 390 U.S. 404 (1968), means only that 'the judgment of [the Supreme Court of Tennessee] remains in effect'," citing **Anderson v. Johnson, Warden**, 390 U.S. 456 (1968). This is an oversimplification.*

This Court in the **Biggers** case gave plenary consideration to the identification question and affirmed the Tennessee Supreme Court. To the Petitioner, an affirmance means that the judgment below is affirmed.

To allow it to be overturned the next day would render the affirmance meaningless. Judge Brooks' dissent cites a number of cases which he believes hold that an equal division affirmance means a conclusive decision on the facts. Leading cases are **Etting v. United States Bank**, 24 U.S. (11 Wheat.) 59 (1826); **Durant v. Essex Company**, 74 U.S. (7 Wall.) 107 (1868); **Hertz v. Woodman**, 218 U.S. 205 (1909); and **United States v. Pink**, 315 U.S. 203 (1941). The fact that the major authorities are so old and the question is unsettled militates in favor of a

---

* This is accepted as an affirmance by others including the Government Printing Office in its slip opinions. An example is the affirmance by an equally divided court in **Radich, Appellant v. New York**, 401 U.S. 531 (1971).

grant of certiorari to decide this important question. The only Twentieth Century authority the court below was able to muster was **Anderson v. Johnson, Warden,** 390 U.S. 456 (1968).

2. The Resolution on the Merits of the Alleged Unconstitutional Identification Is Inconsistent With Previous Decisions of This Court.

The identification was made in 1965 when Mr. Biggers was shown to the victim at the police station. The lower court incorrectly applied the totality of the circumstances test discussed in **Stovall v. Denno,** 388 U.S. 293 (1967), and other lineup and show-up cases. See, **e.g., Coleman v. Alabama,** 399 U.S. 1 (1970), and **Foster v. California,** 394 U.S. 440 (1968). Four Justices of this Court have so thought as indicated by their vote for affirmance when this same issue was here before.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted

BART C. DURHAM, III
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219
Telephone (615) 741-2091
Counsel for Petitioner

Of Counsel
DAVID M. PACK
Attorney General

APPENDIX A

No. 20540

United States Court of Appeals
for the Sixth Circuit

Archie Nathaniel Biggers, Petitioner-Appellee, v. William S. Neil, Warden, Tennessee State Penitentiary, Nashville, Tennessee, Respondent-Appellant.	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed August 18, 1971

Before: Edwards, McCree and Brooks, Circuit Judges.

Edwards, Circuit Judge. In this case we are asked by the State of Tennessee to review and reverse the issuance of a writ of habeas corpus sought by petitioner Biggers in the United States District Court for the Middle District of Tennessee. After a full hearing and after review of the full record of the proceedings in the state courts of Tennessee wherein Biggers had been convicted of rape and sentenced to 20 years in Tennessee's State Vocational Training School, the District Judge found that identification procedures employed by Nashville police and subsequently made the subject of extensive testimony at trial had been so essentially unfair as to represent a deprivation of appellant's federal constitutional right to due process of law. He ordered Tennessee either to retry appellant or release him.

The District Court found the facts pertinent to issuance of the writ as follows:

"On the evening of January 22, 1965, Mrs. Margaret Beamer was attacked at knife-point by an intruder who broke into her home. Mrs. Beamer's screams aroused her thirteen-year old daughter who rushed to the scene and also began to scream. At this point, the intruder is alleged to have said to Mrs. Beamer, 'You tell her to shut up, or I'll kill you both.' This Mrs. Beamer did, whereupon she was taken from the house to a spot two blocks away and raped. The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice.

"Over a seven month period following the crime the police showed Mrs. Beamer various police photographs and had her attend several 'line-ups' and 'show-ups.' However, the victim was unable to identify any of the persons shown to her as being her assailant. Finally, on August 17, 1965, petitioner was arrested as a suspect in the rape of another woman. While petitioner was being detained in connection with that case the police asked Mrs. Beamer to come to the police station to 'look at a suspect.' The identification process employed at this point was called a show-up.

• • •

"At the instant show-up Mrs. Beamer identified petitioner as being her assailant. As to what transpired at the show-up, there is some conflict between the testimony given by Mrs. Beamer at the trial and that given by her at the evidentiary hearing held in this court on October 30, 1969. In testimony given at the trial, Mrs. Beamer testified that on viewing the petitioner the 'first thing' that made her think he

might be her assailant was his voice. However, at the October hearing, Mrs. Beamer testified that she identified petitioner positively prior to having him speak the words spoken by Mrs. Beamer's attacker more than seven months earlier during the crime—'You tell her to shut-up or I'll kill you both.' There is also conflict between the testimony given by police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words.

"At any rate, petitioner was identified at this show-up as being Mrs. Beamer's attacker, and the subsequent indictment and conviction of petitioner was based almost exclusively upon this station house identification.[1]

The District Judge reviewed this record on a legal standard recently reiterated by the United States Supreme Court in language which is directly applicable here:

"In *United States v. Wade*, 388 U. S. 218 (1967), and *Gilbert v. California*, 388 U. S. 263 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a 'critical stage' in the prosecution at which the accused must be given the opportunity to be represented by counsel. That holding does not, however, apply to petitioner's case, for the lineups in which he appeared occurred before June 12, 1967. *Stovall v. Denno*, 388 U.S. 293 (1967). But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, we recognized that, judged by the 'totality of

---

"[1] There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial."

the circumstances,' the conduct of identification procedures may be 'so unnecessary suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law. *Id.*, at 302. See *Simmons v. United States*, 390 U.S. 377, 383 (1968); cf. P. Wall, Eye-Witness Identification in Criminal Cases; J. Frank & B. Frank, Not Guilty; 3 J. Wigmore, Evidence, § 786*a* (3d ed. 1940); 4, *id.*, § 1130." *Foster v. California*, 394 U.S. 440, 442 (1968).

Employing the term "show-up" to refer to a situation where police bring a single suspect before a victim of crime for identification purposes, the District Judge held:

"On this basis the Court must conclude that the circumstances here present are not such as to warrant the show-up procedure and, consequently, that its use at petitioner's trial denied him due process of law.

* * *

[T]here is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screaming of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process. Here, there was no evidence of any death-bed urgency as in *Stovall* which would have precluded the police from delaying the identification procedure until a suitable line-up could have been arranged. The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate show-up rather than a much more reliable line-up. Further-

more, none of the other circumstances which the above discussed cases indicate may justify a show-up existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime.[2] Also, the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission.[3] Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant.[4] The nature of the show-up as conducted in this case—with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner,[5] the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant,—tended to maximize the possibility of misidentification of the petitioner. True, it may have been more convenient for the police to have a show-up. However, in matters of constitutional due process where police convenience is balanced against the need to extend basic fairness to the suspect in a criminal case, the latter value should always outweigh

---

"[2] The only other eye-witness, Mrs. Beamer's daughter could not identify Biggers. *And see*, the case of *United States ex rel. Garcia v. Follette, supra* [417 F.2d 709 (2d Cir. 1969)] and accompanying text and cases.

"[3] See the case of *United States ex rel. Williams v. LaVallee, supra* [415 F.2d 643 (2d Cir. 1969), *cert. denied* 397 U.S. 997 (1971)] and accompanying text and cases.

"[4] See the case of *United States v. Thompson, supra* [417 F.2d 196 (4th Cir. 1969), *cert. denied*, 396 U.S. 1047 (1970)] and accompanying text and cases.

"[5] See *United States v. Gilmore, supra* [398 F.2d 679 (7th Cir. 1968)] and accompanying text." (Footnotes in quotation.)

the former. In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected.

"Due process of law and basic fairness demand that the most reliable method of identification possible be used in a criminal case. *See, Simmons v. United States, supra,* [390 U.S. 377 (1967)] at 383-384. The conduct of the show-up in this case created an atmosphere which was so suggestive as to enhance the chance of misidentification and hence constituted a violation of due process.

"Clearly, this identification did not amount to a harmless error, since the victim's identification of petitioner was virtually the only evidence upon which the conviction was founded. See, *Chapman v. California,* 386 U.S. 18 (1966).

• • •

"Accordingly, judgment will be entered granting the application of Archie Nathaniel Biggers for a writ of habeas corpus, voiding the conviction obtained in the state court, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge, any such new trial to be unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place.' *Biggers v. Tennessee, supra,* at 409, [390 U.S. 404 (1968)].

We too have reviewed the state trial court record and the appellate record above that, as well as somewhat different transcript developed in the testimony before the District Judge. We believe the record does not allow us to

find that the conclusions of fact of the District Judge are clearly erroneous.

In addition, we find no error in the District Judge's understanding of the principles of due process of law as they apply to identification proceedings prior to decision of the *Wade*,[1] *Gilbert*[2] cases. Normally this would mean affirmance of the judgment on the careful opinion written by Judge Miller[3] in the court below.

What divides our panel, however, is the effect of the direct appeal proceedings which preceded the instant federal habeas corpus case. These included affirmance of appellant Biggers' conviction by the Supreme Court of Tennessee, a grant of certiorari by the United States Supreme Court, and the subsequent affirmance of the decision of the Supreme Court of Tennessee by an equally divided vote of the membership of the United States Supreme Court. Our brother finds in the appellate proceedings which culminated with a 4-4 affirmance by the United States Supreme Court a final adjudication of all due process issues arising out of the pretrial identification measures employed in relation to appellant Biggers. As we understand the matter, he regards the 4-4 vote as the expression of a final *federal* view upon the critical due process question involved in this appeal, and believes that it precluded the District Judge from entertaining, taking testimony on, or making findings of fact in relation to the pretrial identification process in the course of appellant Biggers' petition for a federal writ of habeas corpus.

There are three reasons which compel our disagreement:

---

1 *United States v. Wade*, 388 U.S. 218 (1967).

2 *Gilbert v. California*, 388 U.S. 263 (1967).

3 Judge William E. Miller is now a member of the United States Court of Appeals for the Sixth Circuit.

First, the District Judge decided a different question than that which had been presented to the United States Supreme Court on certiorari.

The question upon which certiorari was granted as stated in the Application for Certiorari was:

> "The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months earlier for *voice identification* by the prosecutrix.
>
> "Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a line-up, or with any other means to assure an objective, *impartial identification of his voice* by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights?" (Emphasis added.)

As is clear from the quotation below from Judge Miller's opinion, he expressly did not decide the effect of voice identification, except perhaps as a portion of "the totality of circumstances" of an impermissibly suggestive show-up:

> "[T]he Court finds it unnecessary to reach the issue of whether voice identification as used here amounted in itself to a violation of due process. It may be that the validity of such identification should normally be left to the jury. Since the voice identification took place during the show-up and the show-up procedure itself is unconstitutional as employed in this case, there is no reason to reach the specific issue raised concerning voice identification."

While obviously four members of the court felt that the grant of certiorari opened the door for consideration of a

broad due process question, it is entirely possible that some or all of the four members who voted against reversal did so solely on the voice identification issue squarely represented by the application for certiorari.[4]

Secondly, as we understand the controlling decisions of the United States Supreme Court, we believe that the doctrine of res judicata does not apply in the usual sense in federal habeas corpus proceedings. *Fay v. Noia,* 372 U.S. 391 (1963); *Sanders v. United States,* 373 U.S. 1 (1963); *Townsend v. Sain,* 372 U.S. 293 (1963).

In *Fay v. Noia* the Supreme Court said:

> "The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice. As put by Mr. Justice Holmes in his dissenting opinion in *Frank v. Mangum, supra,* at 348: 'If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above.' It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. *Hence, the familiar principle that res judicata is inapplicable in habeas proceedings,* see, *e. g., Darr v. Burford,* 339 U.S. 200, 214; *Salinger v. Loisel,* 265 U.S. 224, 230; *Frank v. Mangum,* 237 U.S. 309, 334; Church, Habeas Corpus (1884), § 386, is really but an instance of the larger principle that void judgments may be collaterally impeached. Restatement, Judgments (1942), §§ 7, 11; Note, Res Judicata, 65

[4] Since certiorari was granted on the issue of voice identification, the briefs presented before the Supreme Court (quoted at length in Judge Brooks' dissent) could not expand the scope of the Supreme Court's consideration merely by discussing broader due process questions.

Harv. L. Rev. 818, 850 (1952). Cf. *Windsor v. McVeight*, 93 U. S. 274, 282-283. So also, the traditional characterization of the writ of habeas corpus as an original (save perhaps when issued by this Court) civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that a state criminal judgment resting on a constitutional error is void for all purposes. *But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.*" *Fay v. Noia, supra* at 422-24. (Emphasis added.) (Footnotes omitted.)

In *Sanders*, the Supreme Court discussed the same principle:

"*At common law, the denial by a court or judge of an application for habeas corpus was not res judicata. King v. Suddis*, 1 East 306, 102 Eng. Rep. 119 (K. B. 1801); *Burdett v. Abbot*, 14 East 1, 90, 104 Eng. Rep. 501, 535 (K. B. 1811); *Ex parte Partington*, 13 M. & W. 679, 153 Eng. Rep. 284 (Ex. 1845); Church, Habeas Corpus (1884), § 386; Ferris and Ferris, Extraordinary Legal Remedies (1926), § 55. 'A person detained in custody might thus proceed from court to court until he obtained his liberty.' *Cox v. Hakes*, 15 A. C. 506, 527 (H. L., 1890). That this was a principle of our law of habeas corpus as well as the English was assumed to be the case from the earliest days of federal habeas corpus jurisdiction. Cf. *Ex parte Burford*, 3 Cranch 448 (Chief Justice Marshall). Since then, it has become settled in an unbroken line of decisions. *Ex parte Kaine*, 3 Blatchf.

1, 5-6 (Mr. Justice Nelson in Chambers); *In re Kaine*, 14 How. 103; *Ex parte Cuddy*, 40 F. 62, 65 (Cir. Ct. S. D. Cal. 1889) (Mr. Justice Field); *Frank v. Mangum*, 237 U.S. 309, 334; *Salinger v. Loisel*, 265 U. S. 224, 230; *Waley v. Johnston*, 316 U. S. 101; *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260, 263, n. 4; *Heflin v. United States*, 358 U. S. 415, 420 (opinion of Mr. Justice Stewart) (dictum); *Powell v. Sacks*, 303 F.2d 808 (C. A. 6th Cir. 1962). Indeed, only the other day we remarked upon 'the familiar principle that *res judicata* is inapplicable in habeas proceedings.' *Fay v. Noia*, 372 U. S. 391, 423.

"It has been suggested, see *Salinger v. Loisel, supra*, at 230-231, that this principle derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra*, at 402, access to the courts on habeas must not be thus impeded. *The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.*" *Sanders v. United States, supra* at 7-8. (Emphasis added.) (Footnotes omitted.)

Thirdly, we do not believe that logically or historically a 4-4 division of the United States Supreme Court can be held to represent any federal adjudication of appellant's federal constitutional claims on the merits.

An equal division of an appellate court does not settle any principle of law or issue of fact for that court. It represents affirmance of the judgment appealed from because there were insufficient votes for reversal.

Supreme Court opinions which we believe to be settled law demonstrate both principles:

"In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. *No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled;* but the judgment is affirmed, the court being divided in opinion upon it." *Etting v. United States Bank,* 24 U.S. 57, 76 (1826). (Emphasis added.)

"In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? *If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed." Durant v. Essex Co.,* 74 U.S. 107, 112 (1868). (Emphasis added.)

"Four members of the Court would reverse. Four members of the Court would dismiss the writ as improvidently granted. *Consequently, the judgment of the United States Court of Appeals for the Sixth Circuit remains in effect." Anderson v. Johnson, Warden,* 390 U.S. 456 (1968). (Emphasis added.)

As we read these decisions, the equally divided vote of the United States Supreme Court in *Biggers v. Tennessee,* 390 U.S. 404 (1968), means only that "the judgment of

[the Supreme Court of Tennessee] remains in effect." *Anderson v. Johnson, supra,* at 456. There is, of course, no doubt that federal habeas corpus allows for subsequent federal review of claims of federal constitutional violations after final state court judgment. And it is clear from the opinion of the Supreme Court of Tennessee, 411 S.W. 2d 696 (1967), that it neither considered nor decided the federal constitutional validity of the "show-up" which the District Judge on habeas found invalid.

The judgment of the District Court is affirmed.

Brooks, Circuit Judge, dissenting. I respectfully dissent. As indicated in the majority opinion, this is an appeal by the State of Tennessee from an order of the District Court granting petitioner-appellee, Archie Nathaniel Biggers, a writ of habeas corpus. Petitioner Biggers was convicted in state court for the crime of rape. Upon appeal to the Supreme Court of Tennessee the conviction was affirmed. *Biggers v. State,* 219 Tenn. 553, 411 S.W.2d 696 (1967), *reh. denied* March 1, 1967. An appeal to the United States Supreme Court followed. Certiorari was granted, 388 U.S. 909 (1967), and the Supreme Court affirmed the judgment of the Supreme Court of Tennessee by an equally divided Court. *Biggers v. Tennessee,* 390 U.S. 404 (1967), *reh. den.* 390 U.S. 1037 (1967). Petitioner then brought this action for a writ of habeas corpus. The District Court granted the writ, basing its decision to set aside petitioner's state conviction upon its conclusion that the totality of circumstances surrounding petitioner's pretrial identification presented a significant possibility of irreparably mistaken identification,[1] and, therefore, peti-

[1] Petitioner's identification preceded the decisions in *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), and the standards established by those cases are not to be applied retroactively, *Stovall v. Denno,* 388 U.S. 293 (1967).

tioner's constitutional due process rights were violated when this identification (the sole identification evidence) was testified to by the police at the state trial. A number of other constitutional challenges were raised, however, since the District Court concluded that the pretrial identification prejudiced petitioner's constitutional rights, it did not reach the merits of the other claims. For reasons hereafter stated, I would reverse the judgment and remand to the District Court for consideration of the other claims raised by the petition for habeas corpus.

The State of Tennessee has raised two issues on this appeal. First, whether the District Court properly entertained the petition for habeas corpus in light of the United States Supreme Court's affirmance of petitioner's conviction. Second, whether petitioner was denied a fair trial as a result of the use of the identification evidence allegedly the by-product of an unconstitutional identification procedure. The District Court decided both issues in favor of petitioner Biggers, and the State of Tennessee contends both conclusions are erroneous. While the issues as formulated by the State of Tennessee generally convey the nature of the questions under review, they do not accurately delineate the legal controversy involved. Thus, there is really no doubt that the District Court had the power to entertain the petition for habeas corpus, however, the essence of the dispute is whether the power of the court to collaterally review petitioner's state conviction extended to the issue of the constitutional infirmity of the pretrial identification procedure. And the question which divides this Court is what effect, if any, did the United States Supreme Court's equally divided affirmance of petitioner's state conviction have upon subsequent District Court reconsideration, by collateral review, of the identical issue presented to the Supreme Court. I view the crucial issue in this case as essentially one of litigious finality in criminal matters. See Bator, *Finality in Crim-*

inal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963), for a discussion of relevant policy considerations.

The District Court's conclusion on the matter of finality is summed up by its holding that:

> "The fact that petitioner's conviction was technically affirmed by reason of the United States Supreme Court's even division of opinion is of no consequence here since the merits of the claim were not adjudicated. Even if they had been adjudicated, *Sanders* shows that those claims would not have been automatically barred from consideration by this Court in a habeas corpus proceeding."

The District Court, as well as the majority opinion construe the language in *Sanders v. United States,* 373 U.S. 1 (1962), and *Fay v. Noia,* 372 U.S. 391 (1962), that principles of "res judicata are inapplicable in habeas proceedings" to mean that a District Court has jurisdiction to entertain any and all claims raised by a habeas corpus petition. However, I do not interpret that language employed in *Sanders* and *Noia, supra,* to mean there is no finality in a criminal matter. Clearly a criminal defendant having had a particular issue fully litigated first in state court and then federal court, simply cannot turn around upon an adverse resolution of the issue and start the whole process of litigating the question again. The point is well taken, and I do not see a difference of views on the question, that res judicata will not bar the criminal defendant from beginning a habeas corpus proceeding in the United States District Court which raises new issues or issues not fully litigated in the state or federal courts. However, logic and precedent dictate that a defendant is collaterally estopped from relitigating the merits of an issue plenarily litigated and resolved on the merits against him. See *Gaitan v. United States,* 295 F.2d 277, 280 (10th

Cir. 1961), *cert. denied* 369 U.S. 857 and 9 A.L.R.3d 213, discussing the confusion resulting from the indiscriminate use of res judicata nomenclature. Also see, *United States ex rel. Schnetzler v. Follette*, 406 F.2d 319, 322 (2nd Cir. 1969), *cert. denied* 395 U.S. 926, basing a similar holding on the principle of stare decisis.

As has been indicated, the difficult question dividing this Court is whether the issue of the constitutional infirmity of the pretrial identification procedure has been fully litigated. That is, was the equally divided affirmance by the United States Supreme Court of petitioner Biggers' conviction an adjudication on the merits of the pretrial identification issue. The majority feels that the constitutionality of the entire identification procedure had not been scrutinized by the Supreme Court in the original appeal because 1) the District Judge felt he was deciding a different question than that presented to the Supreme Court, that is, the District Judge concentrated his attention on the legality of the show-up rather than on the constitutionality of the voice identification; 2) the application for certiorari filed in the Supreme Court by petitioner stresses only the constitutionality of the voice identification; and 3) there is no positive indication in Mr. Justice Douglas' dissenting opinion in *Biggers v. Tennessee*, 390 U.S. 404 (1968), that more than four Justices considered a "broad due process question". I disagree and believe the record simply does not support the majority's conclusion that the constitutionality of the entire pretrial identification procedure was not wholly reviewed by the Supreme Court.

First, I fail to see what significance can be attached to the fact that the District Court felt that it was deciding a different question than that which was presented to the Supreme Court. Just because the District Court took special interest in the legality of the show-up in assessing the "totality of circumstances" does not mean the Su-

preme Court ignored consideration of that fact or concentrated solely on the voice identification in applying the "totality" test. Moreover, the appellate record shows that the Supreme Court had before it all facets of the identification procedure in reviewing the case on certiorari. Thus, I see no importance in the fact that the District Court chose to emphasize a previously considered aspect of the totality of the identification procedure in determining its constitutionality.

Secondly, I find absolutely no support in the Supreme Court appellate record for the majority's position that Biggers' application for certiorari limited the Court's review only to the constitutionality of the voice identification as, quite to the contrary, the record clearly shows that the entire spectrum of factors surrounding the identification procedure was presented in a broad due process challenge to the conviction. As a preliminary observation, it should be emphasized that even on this appeal petitioner had admitted in his brief that the Supreme Court reviewed the broad due process question. In footnote five of petitioner's brief it is stated:

> "The [Supreme] Court heard arguments and considered briefs with respect to whether Biggers' Fifth and Fourteenth Amendment rights had been abridged in (1) his identification violated the Due Process Clause under the totality of circumstances test adopted in *Stovall v. Denno,* 388 U.S. 293 (1967) and (2) the use *at trial* of words which Biggers was compelled to speak solely for purposes of voice identification violated the Fifth Amendment as incorporated in the Fourteenth. The latter question had been reserved by the Court in *United States v. Wade,* 388 U.S. 218 at 223 (1967)."

While Biggers' application for certiorari was phrased so as to emphasize the voice identification question, the State of Tennessee's statement of the issues presented in its

"Brief In Opposition to the Petition for Writ of Certiorari" definitely indicates a broader due process factual review.[2] Furthermore, the briefs accompanying the application for the writ of certiorari and the actual briefs filed once the writ was granted unquestionably show that all factors surrounding the identification procedure were raised for review in the broadest due process challenge possible. I recognize and regret that quoting from these documents will substantially lengthen this dissenting opinion, but I feel that it is necessary to demonstrate conclusively that the Supreme Court had before it all aspects of the identification procedure in hearing the original appeal in this case, that there has been plenary review of that issue, and that no new issues of fact or law regarding this question were raised by petitioner in his habeas corpus request.[3]

In the appeal to the Supreme Court the grounds for granting certiorari were presented through Biggers' "Petition and Brief for Writ of Certiorari". In that document at pages 7-8, under subtitle "Reasons for Granting the Writ", it is argued:

---

[2] Question II in the State of Tennessee's brief under the subtitle "Questions Presented" was "Whether or not the Sixth Amendment to the United States Constitution relating to assistance of counsel requires counsel to be present during the *identification procedure*, (1) when the investigation is but a general inquiry into an unsolved crime, and (2) when held prior to commencement of criminal proceedings" [Emphasis in original]. And, in the State of Tennessee's "Supplemental Brief in Opposition to the Petition for the Writ of Certiorari" the question specifically addressed was "whether or not petitioner was denied due process of law by the identification procedure followed at the police headquarters. . . ."

[3] An additional reason for quoting at some length from these documents is that they are not readily available. In quoting from these materials, I have omitted footnotes and references to transcript pages, however, the complete record of all documents filed in this case in the Supreme Court may be found in Volume 51. Transcripts of Records and File Copies of Briefs, Nos. 232-237, Supreme Court of the United States, October Term 1967.

Petitioner Was Denied His Rights Under the Due Process Clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the United States Constitution Under Circumstances Similar to Those in Conflicting Court of Appeals Cases Granted Certiorari and Presently Pending Before This Court.

The facts in this case are starkly simple, but they raise a critical question of the fairness and impartiality of police identification practices. They reveal that Archie Biggers was denied his right to a fair trial by police practices which denied him elementary Fourteenth Amendment protections.

The only evidence against petitioner at trial was the identification made by the prosecutrix, Mrs. Margaret Beamer, that Archie Biggers was the man who had raped her. Biggers, a 16 year old Negro was arrested early on the morning of August 17, 1965 and charged with the attempted rape of another woman (Tr. 70). Later the same day, the police brought Mrs. Beamer, who had been raped on the night of January 22, 1965, almost eight months earlier (Tr. 4-7, 20, 85-88) to "look at a suspect" (Tr. 27-28, 57, 106, 109-110). Unable to describe or identify her assailant (Tr. 13) her case had remained without clues. Asked to identify Biggers if she could, the first view she had of the petitioner was of him alone in the custody and presence of five police officers (Tr. 112). He had no lawyer. The police then required him to speak the exact words of the rapist spoken during the offense (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156), on the basis of which she identified petitioner as the rapist. These were the circumstances surrounding the identification by the prosecutrix.

The facts in this case raise the issue present in conflicting Second and Fifth Circuit cases which this

Court has granted certiorari to determine. *United States ex rel. Stovall v. Denno*, 355 F.2d 731 (2nd Cir. 1966), cert. granted 34 U.S.L. Week 3429 (June 20, 1966); *Wade v. United States*, 358 F.2d 557 (5th Cir. 1966), cert. granted 35 U.S.L. Week 3124 (Oct. 10, 1966). The Second Circuit, sitting *en banc*, held that the defendant's Fifth, Sixth and Fourteenth Amendment rights were not violated when he was taken to the victim's hospital room for identification without the benefit of a line-up or counsel, even though arraignment had been postponed to allow him to obtain counsel. The Fifth Circuit, in *Wade v. United States, supra*, specifically adopted the view of the dissenting judges in *United States ex rel. Stovall v. Denno, supra*. It excluded testimony of the line-up on the ground that the line-up had violated the defendant's constitutional rights because two witnesses had seen him in the custody of the police shortly before the line-up, and defendant's counsel had not been notified and was not present at the line-up. Archie Biggers, like Wade, was denied elemental protections against suggestion and the right to counsel during the test to identify his voice. Indeed, the circumstances of Biggers' identification were less conducive to impartiality than those in *United States v. Wade, supra*, and the arguable necessity for speed in identification and difficulty in arranging a line-up involved in *United States ex rel. Denno, supra*, is not present in this case.

In subsection II of that subtitle ("The Facts in This Case Show That Petitioner Was Denied Due Process of Law and the Protection of the Fifth and Sixth Amendments to the Constitution of the United States") it is argued:

To negate inference or suggestion from an identification proceeding, a line-up is generally regarded as

essential to provide a mode of comparison by police authorities. See *Criminal Investigation and Interrogation,* Gerber and Schroeder ed., § 22.20 (1962); *Criminal Investigation,* Jackson ed. (5th ed. 1962) at pp. 41-42. The failure to provide Archie Biggers with the protection of a line-up in a rape case, considering his youth, the eight month period since the rape and other circumstances is inexcusable. There was no reason for the lack of a line-up, and every reason to provide one. As Archie Biggers was being held in police custody for an unrelated charge, this is not a case of street identification immediately after arrest, nor even a case where it was physically impossible to hold a line-up. Nor was there need to identify Archie Biggers quickly. Mrs. Beamer had been raped eight months earlier and the time necessary to arrange a line-up certainly would not have affected her identification. Indeed, the time lapse, well known to the police, should have been sufficient to mandate a line-up to police conscientiously seeking an impartial, dispassionate identification.

Again in subsection II at pages 12-13 it is argued:

> Archie Biggers was also denied his right to assistance of counsel at the time of his identification, clearly a "critical stage" in his case. *Escobedo v. Illinois,* 378 U.S. 478, 486 (1964). The police were without a clue to the identity of the man who had raped Mrs. Beamer. If she could identify a man it would certainly form at least the basis for prosecution. If counsel had been present he could have done several things to insure an impartial test. He could have requested a line-up, or alternatively some other plan to assure conditions designed to avoid suggestion. If present, counsel could have questioned the prosecutrix during identification before she had placed herself in

the position of making a positive identification. It is quite possible that his mere presence would have served to counterbalance that of the police, and the inherent suggestiveness of police station identification of one in custody. Had counsel been present he might have prevented the police from requiring the petitioner to speak the words of the rapist, words which carried an inherent suggestion of guilt. Or counsel might have advised his client to remain silent.

The circumstances of this case, taken separately and in combination, establish violations of the due process clause of the Fourteenth Amendment, and through it, violations of the Fifth and Sixth Amendments.

In the State of Tennessee's "Brief in Opposition to the Petition for Writ of Certiorari" it is argued at page 8:

> Petitioner urges this Court to grant certiorari in this case because he contends that the identical question raised here is presented in the two (2) cases mentioned in which this Court has previously granted certiorari. Respondent respectfully insists that the questions are not the same.
>
> It is clear from an analysis of **United States ex rel. Stovall v. Denno**, *supra*, and **Wade v. United States**, *supra*, that the question in those cases is not whether it is a violation of due process for a victim to identify an accused during an identification procedure at police headquarters, but whether it is incumbent upon the State to provide counsel to the accused at the identification procedure following the commencement of criminal proceedings against him. The case at bar is unlike those cases inasmuch as at the time of the identification of the accused by Mrs. Beamer, no criminal proceedings had commenced insofar as this matter is concerned. The plain truth is that the petitioner had been arrested on a separate charge and as a mat-

ter of general inquiry Mrs. Beamer was called to see whether or not she could identify him.

Once certiorari was granted the briefs decidedly show that the Supreme Court had before it for review each and every aspect of the identification procedure so as to assess the "totality of circumstances." Beside the point that the "totality" test raises a factually all encompassing due process issue, in Biggers' Supreme Court brief under the subtitle "Argument" the broadest due process argument is made. Therein, at pages 8-18, it is argued:

> **The Circumstances of Petitioner's Pre-Trial Identification and Its Use as Evidence at Trial Deny Him Due Process of Law as Guaranteed by the Fourteenth Amendment.**
>
> The decisions of this Court in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) holding pre-trial identification in absence of counsel violates the Sixth Amendment, would require reversal in this case but for the decision in *Stovall v. Denno*, 388 U.S. 293 (1967), barring their retroactive effect. Like Wade and Gilbert, Biggers was denied the right to the assistance of his retained counsel by the police holding a pre-trial identification proceeding in his attorney's absence. The Court remanded *Wade* to determine whether a subsequent in-court identification should be excluded as the tainted product of the line-up identification, while *Gilbert* excluded in-court testimony of the pre-trial identification *per se*. As petitioner was convicted on the testimony of the prosecutrix's pre-trial identification at a showup (she did not attempt to identify him at trial) where petitioner was unrepresented by counsel, Biggers would be entitled under *Gilbert* to exclusion of the identification.

A. The Failure of the Police to Hold a Lineup Violates Due Process.

The question, therefore, is that left open in *Stovall v. Denno*, 388 U.S. 293, 301, 302 (1967), whether the pre-trial confrontation between petitioner and the victim "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer v. Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966)." The accused in *Stovall* was identified without a lineup, a procedure of acknowledged suggestiveness: "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned" (388 U.S. at p. 302). Nevertheless, due process was not violated in *Stovall* solely because of exigent circumstances. The victim was in danger of death, and if an identification was to be made at all "an immediate hospital confrontation was imperative" (*Ibid.*).

The extraordinary need for an immediate identification without a lineup present in *Stovall* is completely absent here. On the contrary, at the time of the identification, Biggers was in police custody on an unrelated charge and continuously available for identification. Similarly, Mrs. Beamer was, and had been for seven months, continuously available to identify possible suspects. Her health was unimpaired, and no other factors made an immediate identification by her without a lineup "imperative." Held without exigent compelling circumstances, Biggers' showup identification violated due process under the reasoning of *Stovall v. Denno, supra.*

United States v. Wade, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) found need

of impartial and selective identification procedures, and thereby the need for counsel, even when a lineup is held in part because the reliability of any identification of a stranger is severely limited by normal human fallibilities of perception and memory. A showup, on the other hand, results in the maximization of suggestion that the suspect is the guilty party and suggestion is the " 'one factor which, more than anything else, devastates memory and plays havoc with our best intended recollections * * *.' " Suggestion is in large part the product of restricted selectivity offered the witness in the identification process. Instead of being forced to choose between several persons with different heights, weights, profiles and voices, Mrs. Beamer was confronted with a single individual whose suspected guilt the police communicated by presenting him alone and in custody. The witness is free to accept or reject this police judgment, but not to choose. With good reason, therefore, the showup is labelled "the most grossly suggestive identification procedure now or ever used by the police." Wall, Eyewitness Identification in Criminal Cases 28. See also, *Stovall v. Denno*, 388 U.S. 293, 302 n. 5 (1967).

In identifying petitioner, Mrs. Beamer relied particularly on her recollection of a voice she had not heard in seven months, but selectivity is decreased even more when identification is by voice. An identification by physical appearance may rest upon various characteristics, one or a combination of which may be particularly striking, such as the shape of a nose or mouth, skin complexion, scars, or height and weight. Voice identification rests merely upon the tone and timbre of a voice, as well as an individual's speech peculiarities. When few words are spoken and no special speech peculiarities are present, as in this

case, only tone and timbre are left to provide identification. Selectivity is at the barest minimum; the probability of error is maximized. Biggers, moreover, spoke softly during the identification (R. 17). It is difficult to believe the intruder spoke this way during the assault and rape. The unreliability of voice identifications as compared to physical identifications, with the resultant increased necessity for a lineup, was recognized by the Fourth Circuit in *Palmer v. Peyton*, 359 F.2d 199, 201-202 (1966):

> "Where the identification is by voice alone, the absence of some comparison involves grave danger of prejudice to the suspect, for as one noted commentator has pointed out: '[E]ven in ordinary circumstances one must be cautious and accept only with reserve what a witness pretends to have heard * * *.'"

This Court rigorously questioned the reliability of all identification testimony in *United States v. Wade, supra,* and quoted with approval Mr. Justice Frankfurter's observation that: "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." The Case of Sacco and Vanzetti 30. If this characterization applies to an identification by lineup, where comparison and selectivity are greatest and suggestion minimal, it applies with far greater force to the showup in this case where Mrs. Beamer could only accept or reject police suspicion that Archie Biggers was the rapist, and where the showup identification was the sole evidence of guilt, see *infra* p. 17.

The holding in *Stovall* that absent unusual circumstances a show-up violates the due process rights of

an accused is also soundly rooted in the policy adopted in *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California,* 388 U.S. 263 (1967). Those cases envision that "presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial." (388 U.S. at 236). Suggestion is to be prevented by an attorney calling the attention of the police to identification procedures which produce it and by proposing safeguards. For the attorney to play a practically meaningful role as insurer of the integrity of the pre-trial identification proceedings, practices such as the showup which result in undue suggestion must be condemned or counsel is reduced to the role of passive observer, unable to prevent unreliability and reduced to attempting to expose it after the fact at trial. If counsel is unable to assert that a procedure as destructive of reliability as the show-up is unconstitutionally suggestive, it is difficult to see how he will be able to assist law enforcement as *Wade* presupposes "by preventing the infiltration of taint in the prosecution's identification evidence" (388 U.S. at p. 238).

B. The Circumstance of the Identification and Its Use at Trial Violate Due Process.

This case, however, goes far beyond *Stovall, supra.* The record affirmatively shows that petitioner's identification, and the use made of it by the state, denied him the fair trial guaranteed by the Fourteenth Amendment. The circumstances which denied Archie Biggers due process will be separately examined, but, of course, their prejudicial impact upon his trial is cumulative.

First. Prior to the police call "to look at a suspect" Mrs. Beamer was particularly open and sus-

ceptible to suggestive influence. The crime had occurred seven months earlier and had lasted at the most 30 minutes; inevitably the sharpness of her memory had faded. Mrs. Beamer, by her own admission at trial, was terrified by fear of violence to herself and children. When asked (R. 14):

> Q. "Are you able to describe this man other than seeing a butcher knife?"

She replied:

> A. "No, other than I remember the blade being shiny."

The crime took place at night. Mrs. Beamer was grabbed in an unlit hallway and marched through an unlit kitchen to railroad tracks and then to a wooded area. At trial, she gave only a general explanation of the characteristics which led her to identify petitioner. As the Court said in *Wade,* the danger of suggestion is "particularly grave when the witness' opportunity for observation was insubstantial. . . ." (388 U.S. at p. 229).

Second. The police suggested that the petitioner was the rapist when they arrived at Mrs. Beamer's home and asked her to go "look at a suspect." Inherent in the word "suspect" was the suggestion that the police had sufficient evidence linking the petitioner to the crime to warrant holding him at the police station for her identification. Thus the normal expectation of a witness that the guilty person will be present at the identification was substantially increased by the police. Cf. Williams, Proof of Guilt, 96.

Third. At the station house Mrs. Beamer first saw Archie Biggers in the custody of five police officers, all of whom remained present during the identification. The sheer number of officers, implying the importance of the petitioner as a "suspect", may well have allayed any thought by the witness that this

might not be "the man." On the other hand, the number of officers may have increased her fear of contradicting the police as to the identity of a man regarded by them for reasons unknown to her as a "suspect."

Fourth. When Mrs. Beamer did not identify Biggers by his physical appearance, the police required him to speak words spoken during the attack—"Shut up or I'll kill you."—and eventually his compelled speech was presented to the jury at trial. There is little that could have been more suggestive of his guilt. Mrs. Beamer had not indicated that the rapist had particular speech mannerisms which required those words to be spoken, and even if he had had speech peculiarities he could have spoken other sentences of phrases containing each of these words. Whether or not a violation of petitioner's Fifth Amendment rights (see Argument II, *infra*) use of the rapist's precise words was unnecessarily suggestive.

Wall has evaluated the latter two suggestive techniques used in this case. He states that "As bad as a show-up is, there are a number of ways it can be made worse. * * * One method is to point out the suspect to the witness even before the showup, indicating his status as suspect. * * * If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the manner in which the perpetrator of the crime is supposed to have acted or spoken, a method adopted for example, in the Sacco-Vanzetti case." Eyewitness Identification in Criminal Cases 30.

Fifth. Archie Biggers was unprepared and unequipped to protect himself against an identification made unfair by suggestions to the witness. He was 16 years old, had a ninth grade education, and ap-

parently no previous police record. His immaturity, relative lack of education, and unfamiliarity with police procedures combined to make it difficult for him to intelligently safeguard himself against suggestive influence at the identification. Cf. *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegas v. Colorado*, 370 U.S. 52 (1962); *In Re Gault*, 387 U.S. 1 (1967). This vulnerability to police procedures suggesting his guilt was further increased by the failure to notify Biggers' family of the identification despite the fact that his mother was available, the police having notified her earlier on August 17th that her son was being held on an unrelated charge. While the nonretroactivity of the Sixth Amendment holding of *Wade, supra* and *Gilbert, supra*, precludes reversal solely on the basis of lack of counsel, the consequences of an identification proceeding held without an attorney present must be noted as they affect an accused's right to a fair trial. Cf. *Davis v. North Carolina*, 384 U.S. 737, 740, 741 (1966). Placed in an unfamiliar situation and seized by the natural fear of one whose liberty depends upon another, an accused is unlikely either to reconstruct completely or be capable of testifying to all the suggestive influences which would reflect on the witness' impartiality and credibility. An accused as young and inexperienced as Archie Biggers is particularly affected by these disabilities. We can never know if additional suggestive influences may have further tainted the identification in this case, but we do know that the procedure employed maximized potential suggestion without the protective presence of counsel to protect the right to cross-examine, *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

Sixth. The pre-trial identification was exploited at trial by the State's complete reliance on the tainted

identification. Although she came to within a foot of the assailant, Mrs. Beamer's young daughter could not identify Biggers. Mrs. Beamer did not attempt an in-court identification. The pre-trial identification was offered by the state and was presented emphatically to the jury as the difference between guilt and innocence. No other evidence of guilt was presented although testimony elicited by the prosecution from four police officers as to what transpired at the identification made it appear to the jury that Mrs. Beamer's testimony was corroborated, see *United States v. Wade,* 388 U.S. at p. 247 (opinion of Mr. Justice Black). According to the prosecuting attorney, the excitement of the crime was proof of accuracy of the subsequent identification. Professor Borchard's studies show, however, "that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception became distorted and his identification is frequently most untrustworthy" Convicting the Innocent, XIII (1961). This is especially true in a rape prosecution where, as the Court has recognized, identification presents "a particularly hazard that a victim's understandable outrage may excite vengeful or spiteful motives" *United States v. Wade,* 388 U.S. at p. 230.

Seventh. Without exception, the state could have employed procedures to safeguard the fairness of the identification and trial but did not do so. There was no practical impediment to a lineup. The witness need not have been told Biggers was a suspect. He did not have to repeat the precise language used by the criminal. Parents and counsel were available and could have been present. The number of officers at the identification was surely excessive and their testimony at trial served only to prop up a thin case. No in-court identification was offered. It was unneces-

sary for the state to initiate reference to prejudicial newspaper accounts of Biggers' arrest and identification or to permit the jury to learn that Biggers spoke the words of the criminal. Finally, it may have been good advocacy for the prosecuting attorney to tell the jury that "violence and terror . . . fixes these matters indelibly in a person's mind" (R. 177) but it hardly speaks of dedication to "making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime" *United States v. Wade,* 388 U.S. at p. 256 (opinion of Mr. Justice White).

The unfairness which began with the police labelling petitioner a "suspect", extended through an identification replete with suggestion that he was the rapist from which he could not safeguard himself, and culminated at a trial in which the tainted identification was the sole basis of conviction. At every turn the police acted in such a way as to make a reliable identification impossible. Archie Biggers has been denied the fundamental fairness guaranteed him by the due process clause of the Fourteenth Amendment and his conviction should be reversed.

In response to this argument, the State of Tennessee countered, in its main brief in opposition to the merits of the appeal, arguing:

Although the petitioner was not deprived of his Fifth Amendment privilege against self incrimination nor was he deprived of his Sixth Amendment right to counsel, this Court is asked to review the circumstances of the identification to determine whether or not they were so suggestive as to deprive the petitioner of his right to a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court in the case of **Stovall v. Denno**, *supra*, held that although the accused was not denied his Sixth Amendment rights because of the prospective application of **Wade** and **Gilbert**, the matter could be reviewed in order to determine whether a fair trial was given him. This review for the purpose of determining whether or not the identification confrontation was fair, was made upon the authority of **Palmer v. Peyton**, 359 F. 2d 199 (4th Cir. 1966). This Court stated that a "claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it". It is necessary that this Court review the circumstances surrounding the identification of the petitioner in the case at bar. It is significant that the Court in the case of **Palmer v. Peyton** reviewed the circumstances and determined that the accused therein was deprived of a fair trial as guaranteed by the Fourteenth Amendment although that particular question had never been raised below. It is also significant that the Court in the **Palmer** case cited no authority upon which it reviewed the circumstances surrounding the identification.

The petitioner Biggers was arrested during the night of August 16, 1967, taken to juvenile court and released by the juvenile court to the metropolitan police of Nashville. Mrs. Beamer had been raped months earlier and had from time to time visited the police department in an attempt to identify suspects. She was called to identify if possible the petitioner while he was being held on a separate and unrelated charge. He had been advised at the juvenile court of his constitutional rights as had his mother. He was displayed to Mrs. Beamer at police headquarters and asked to speak certain words. She had reviewed police files and viewed suspects during the months

since her rape. The identification which she made of Biggers was not the product of suggestion but was the result of many months of investigation. Mrs. Beamer identified the petitioner in Court also. There is no indication that her identification in the courtroom was the result of police suggestion nor is there any indication that her identification in the courtroom was the result of or influenced by her identification before trial.

In the **Stovall** case the accused was handcuffed to one of five police officers who, along with members of the District Attorney's Office, brought him to a hospital room in which the victim of the assault was confined. He was identified by the victim from her hospital bed after having been required to speak "words and voice identification". This Court held that the circumstances were not such as to indicate that the petitioner Stovall was deprived of his right to a fair trial as guaranteed by the Fourteenth Amendment. The facts in the **Stovall** case are very similar to the facts in the case at bar.

This Court should affirm the conviction of the petitioner for rape. There is nothing in the record to indicate that the petitioner has been deprived of his right to due process.

Following the equally divided decision by the Supreme Court, Biggers petitioned for rehearing arguing:

Subsequent to the Court's ruling in petitioner's case, certiorari has been granted to consider, in the case of another state prisoner, those circumstances which result in an identification procedure violating the Due Process Clause of the Fourteenth Amendment, *Foster v. California*, No. 638 Misc., 36 U. S. L. Week 3374 (3/25/68). *Foster* involves a lineup which is alleged to have been unconstitutionally conducted.

> As petitioner was not accorded the elementary protection of a lineup—and the record is barren of evidence justifying the failure to hold one—reversal in *Foster* would, *a fortiori*, affect, if not determine, final resolution of petitioner's constitutional claim. An intervening circumstance such as "the fact that the same or a related issue has come before the court in other cases still pending" is a common ground for grant of rehearing. Stern and Gressman, Supreme Court Practice, 3rd Ed. 389; see *Pickett v. Union Terminal Co.*, 313 U.S. 591 (1941); 314 U. S. 704 (1941); 315 U. S. 386, 389, 394 (1942). It is plainly appropriate and just that the results in these two cases conform. Unless it is beyond doubt that principles announced in *Foster* will not bear upon petitioner's claim, this petition should be granted.

The petition was denied.

On the basis of this appellate record, it seems impossible to simply assume that the Supreme Court failed to assess each and every aspect of the identification procedure and considered only the voice identification issue as conjectured by the majority opinion. I view Mr. Justice Douglas' dissenting opinion in which the due process issue issue is discussed as a significant indication of the all inclusive factual review given that issue. In short, I believe that the only conclusion which may be drawn from the appellate record in the Supreme Court is that all facts surrounding the pretrial identification were plenarily reviewed by the Court, and the proceedings in the District Court, pursuant to the request for habeas corpus, not only could not raise any new or unexplored factual or legal matters with respect to this issue, but were a mimicry of the Supreme Court review.

If, as the appellate record indicates, there was a complete review by the Supreme Court of the identification

procedure applying the appropriate legal test, the next question dividing this Court is what effect the evenly divided decision had on the merits of that issue. I believe that logically, historically and legally a decision reached by an evenly divided court is on the merits. The majority correctly states that an equal division of an appellate court does not settle any principle of law. Logic, of course, compels this result since to establish a principle of law having precedent value a majority decision is required. Both *Etting v. United States Bank*, 24 U.S. (11 Wheat.) 59 (1826), and *Durant v. Essex Company*, 74 U.S. (7 Wall.) 107 (1868), so hold. However, I disagree with the majority's statement that an equal division of an appellate court does not settle an issue of fact. To the contrary, the expression "finally disposed of" in *Durant v. Essex Company, supra*, I believe means a conclusive decision on the facts. In addition, in *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1909), it is stated:

> "Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, . . ."

And, in *United States v. Pink*, 315 U.S. 203, 216 (1941), it is stated that while an affirmance of a judgment by an equally divided court is not an authoritative precedent it is "conclusive and binding upon the parties as respects that controversy". See also, *United States v. Reeside*, 19 L.Ed. 391 (1868).

While this rule is well established in civil cases, because of the novelty of the problem, there are only a few criminal cases which have explored the effect of a judgment arrived at by an equally divided court. However, several state courts having been presented with the problem in criminal cases have concluded that an affirmance

by an equally divided court is, like in a civil case, on the merits of the issues presented and ends the dispute over those issues. See *Chahoon v. Commonwealth*, 62 Va. 822, 825 (1871), construing a statute; and see *State ex rel. Hampton v. McClung*, 47 Fla. 224, 37 So. 51 (1904); *Ex parte White*, 131 Fla. 83, 178 So. 876 (1938); *Dean v. State*, 173 Miss. 255, 309-310, 162 So. 155 (1935), interpreting the common law.

The only federal criminal case besides *Biggers* and *Carter, supra*, which research has uncovered involving a judgment arrived at by an equally divided court, is *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798). There the defendant was found guilty in the United States Circuit Court of attempting to bribe a United States Commissioner of Revenue. Mr. Justices Chase and Peters were unable to agree upon the question of whether the federal courts had common law jurisdiction in criminal cases, and there being no right of criminal appeal at that early date to the Supreme Court, of which the Justices were also members, the judgment was affirmed because of the equally divided court and punishment was imposed. Admittedly, the affirmance resulting from this divided court was a technical affirmance, but nevertheless it was a final judgment upon which a prison sentence and fine were imposed. See generally, 4 C.J. § 1121; 24B C.J.S. § 1945. These precedents persuade me that an affirmance by an equally divided court in a criminal case, following review of the issues presented, is on the merits of the issues even though the affirmance must follow because the judges are equally divided. And, as the appellate record clearly shows, the issue of the constitutionality of Biggers' pretrial identification has been completely reviewed on the totality of facts by the Supreme Court. Accordingly, I would hold that while petitioner is not barred from raising new issues or issues not fully litigated in his habeas corpus petition, he is, however, collaterally es-

topped from relitigating the merits of the identification issue since that issue has been plenarily litigated and resolved on the merits against him. Thus, I would reverse the judgment and remand the case to the District Court for consideration of the other constitutional issues raised by petitioner's petition for a writ of habeas corpus.

APPENDIX B

In the District Court of the United States
for the Middle District of Tennessee
Nashville Division

Archie Nathaniel Biggers,
Petitioner,
v.
William S. Neil, Warden Tennessee State Penitentiary, Nashville, Tennessee,
Respondent.
} Civil No. 5120

ORDER

(Filed May 4, 1970)

Respondent in the instant case has filed with the Court a Motion to Reconsider. In so doing, respondent alleges that the Court erred in accepting jurisdiction over the instant habeas corpus matter and in deciding on the merits of petitioner's claims. Respondent's allegation of error rests on the proposition that the affirmation of petitioner's conviction by reason of the equal division of opinion of the United States Supreme Court when it heard petitioner's case in **Biggers v. Tennessee**, 390 U.S. 404 (1968), was an adjudication that "is as conclusive and binding upon the parties as if rendered upon the concurrence of all participating judges upon every question involved in the case." Respondent further contends that since the issues raised in this case have been thus "adjudicated" by the Supreme Court, the doctrine of res judicata should apply and the instant petition should have been dismissed by the Court.

The issue raised by respondent's present motion may be stated thusly: In a habeas corpus proceeding, does an affirmation by reason of an equal division of opinion among the Justices of the Supreme Court amount to an adjudication between the parties which, even though no decision was rendered as to the merits of petitioner's claim, must be considered final in that the doctrine of res judicata would bar petitioner from raising the same constitutional claims in a subsequent habeas corpus petition?

After a thorough consideration of the case law relevant to the issue, the Court remains of the opinion expressed in its Order of May 12, 1969, that the merits of petitioner's constitutional claims were left undecided by the equally divided Supreme Court and that the doctrine of res judicata does not operate in such a manner as to bar petitioner from raising those constitutional claims again as presented in his habeas corpus petition. It is generally true that when the Supreme Court is equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. **Etting v. Bank of the United States**, 24 U.S. 59 (1826). Furthermore, as respondent points out, there is a general rule to the effect that "an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged. . . ." **Hertz v. Woodman**, 218 U.S. 205 (1910); **and see United States v. Pink**, 315 U.S. 203 (1942); **Durant v. Essex Co.**, 74 U.S. 107 (1868); and **Kaku Nagana v. Brownwell**, 212 F.2d 262 (7th Cir. 1954). However, the Court is of the view that the general rule espoused in the above cited cases cannot be taken to stand for the proposition that a technical affirmation which results from the fortuitous circumstance of an equally divided court and which makes no pronouncement, either pro or con, on the merits of the constitutional claims of a habeas corpus petitioner, must be protected by the

doctrine of res judicata. The cases cited by respondent in support of his argument are unconvincing since they deal wholly with litigation concerning property rights[1] rather than the right of a criminal defendant to due process of law where there is a possibility that his liberty or even his life may be forfeit. As the leading cases on the effect of affirmation due to an evenly divided court make clear, the principles of law which are argued in such a case are not decided but, rather, are left unsettled. In such a circumstance, the Court affirms out of necessity since, in its evenly divided state, it cannot overturn the lower court ruling. Such an affirmation is a technicality only, growing out of the policy of judicial administration that there must at some point be an end to litigation. **See, Etting v. Bank of the United States**, 24 U.S. 59 (1826).

It is inconceivable that a technical rule such as this, born to serve the needs of judicial administration, could be employed to deny a criminal defendant the right to obtain a full judicial determination of his constitutional claims in the federal courts. Certainly, it would amount to a travesty on justice if such a result were permitted. In the circumstances surrounding this case that travesty would be compounded by the fact that the even split of

---

[1] In cases involving contract rights, various property rights, tax liability questions, etc., there are overriding economic and administrative interests in seeing that finality is achieved in litigation so that "business can proceed as normal." The cases cited by respondent make this very clear. In **Hertz v. Woodman**, 218 U.S. 205 (1910), the Court was concerned with deciding who was entitled to the possession and enjoyment of a distributive share of an estate for tax purposes; in **Durrant v. Essex Co.**, 740 U.S. 107 (1868), the question involved rights in certain realty; in **United States v. Pink**, 315 U.S. 203 (1941), the Court was concerned with the disposition of surplus funds of a Russian insurance company; and in **Kaku Nagana v. Brownwell**, 212 F.2d 262 (7th Cir. 1954) suit was brought to recover stock vested by an alien property custodian pursuant to the Trading with the Enemy Act.

opinion occurred because of the necessity of Mr. Justice Marshall having to recuse himself apparently due to past professional association with petitioner's attorneys. The liberty of petitioner and others like him should not be left to the mercy of mere fortuity.

Fortunately, it has been recognized from early common law days to the present that such technicalities cannot be used to thwart the right of the criminal defendant to have merits of his constitutional claim fully adjudicated. As the United States Supreme Court has recently stated: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." **Sanders v. United States**, 373 U.S. 1 at 8 (1962).[2] Indeed, it has long been recognized as a "familiar principle that *res judicata* is inapplicable in habeas proceedings." **Fay v. Noia**, 372 U.S. 391 at 423 (1962). If government is always to be accountable to the judiciary for a man's imprisonment, then access to the courts by way of habeas corpus must not be thus impeded. "The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ." **Sanders v. United States**, *supra*, at 8; and see e.g. **Fay v. Noia**, *supra* at 402; **King v. Suddis**, 1 East 306, 102 Eng. Rep. 119 (K.B. 1801); and, **Cox v. Hakes**, 15 A.C. 506 (H.L., 1890).

The Court is not persuaded by respondent's proposed interpretation of 28 U.S.C.A., § 2244(c), dealing with the finality of determinations by federal courts in habeas corpus proceedings. As **Sanders** makes clear, § 2244(c) was "not intended to change the law as judicially evolved." Furthermore, "if construed to derogate from the traditional liberality of the writ of habeas corpus,

---

[2] **See** Note 1 *supra*.

. . . § 2244 might raise serious constitutional questions."[3] **Sanders v. United States**, *supra*, at 11-12, and see, **Fay v. Noia**, *supra*, at 406.

It should be made clear that while *res judicata* is inapplicable in habeas corpus proceedings, it is proper for a judge to deny subsequent applications for habeas corpus relief on the ground that the first denial had followed a full hearing on the merits. However, it should also be made clear that a judge is **permitted** to dismiss on such grounds and **not required** to order a dismissal by reason of any considerations of *res judicata*. See, **Salinger v. Loisel**, 265 U. S. 224 (1960); and, **Sanders v. United States**, *supra*.

The **Sanders** case is instructive as to the types of situations in which a judge may correctly elect to dismiss a habeas corpus petition on the ground that a previous hearing has disposed of the petitioner's claims on their merits. **Sanders** states that:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." **Sanders**, supra at 15.

and further that:

> "No matter how many prior applications for federal collateral relief a prisoner has made [controlling weight may not be given to denial of prior applications], if a different ground is presented by the new

---

[3] See U. S. Const., Art. I, § 9, cl. 2 which provides:
"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

application [or] **if the same ground was earlier presented but not adjudicated on the merits''** [Emphasis added]. **Sanders**, supra at 17.

Looking to the facts here presented in light of the **Sanders** rule and the foregoing reasoning, the Court concludes that the prior hearing of petitioner's appeal by the United States Supreme Court did not determine the merits of petitioner's constitutional claim. Further, as the memorandum opinion issued by the Court on April 17, 1970, makes clear, the ends of justice have been served by this Court in hearing petitioner's case and reaching the merits of the constitutional claims presented. The fact that petitioner's conviction was technically affirmed by reason of the United States Supreme Court's even division of opinion is of no consquence here since the merits of the claim were not adjudicated. Even if they had been adjudicated, **Sanders** shows that those claims would not have been automatically barred from consideration by this Court in a habeas corpus proceeding.

It occurs to the Court that there is yet another logical reason to support its decision to consider petitioner's claim. The United States Supreme Court hearing in the **Biggers** case followed the acceptance by the Court of a writ of certiorari to review the affirmation of petitioner's conviction by the Tennessee Supreme Court. The fortuitous circumstance of an equally divided United States Supreme Court simply had the effect of leaving undisturbed without opinion the ruling of the State Supreme Court. Therefore, the instant habeas corpus petition is, in effect, an **initial** federal habeas corpus petition alleging error in a state criminal conviction. This being the case, the Supreme Court of the United States has recently established the proposition that notions of finality, such as *res judicata,* forfeiture, or waiver, cannot be applied so as to preclude the initial consideration of federal constitutional claims in a federal court. **Fay v. Noia,** *supra* at 428.

Finally, it should be readily apparent that the situation presented in the instant case is highly analagous to the situation where a criminal defendant, after appealing his case to the highest state court, has had his conviction affirmed by that court and has subsequently sought relief by way of habeas corpus petition in a federal district court. The analogy may be drawn as follows. Due to the equal division of opinion among the Justices, the United States Supreme Court did not decide this case on its merits. Therefore, the Tennessee State Supreme Court is the highest court to have expressed an opinion as to the merits of petitioner's claim. That being the case, the Court is of the view that petitioner Biggers stands in essentially the same position as a criminal defendant who, having exhausted his state court remedies pursuant to 28 U.S.C.A., § 2254, makes application for habeas corpus relief in federal district court. In such a situation, and in the instant situation, this Court has jurisdiction to fully adjudicate petitioner's constitutional claims since it is an unchallengable principle of law that in habeas corpus cases the ruling of the highest court of a state on a constitutional claim never bars consideration of the same constitutional issue by a federal district court. Principles of *res judicata* simply have no application in this situation.

Accordingly, for the foregoing reasons the Court concludes that the technical affirmation of petitioner Biggers' state conviction by reason of the equally divided court does not foreclose this Court from disposing of the petitioner's constitutional claim on its merits. Therefore, respondent's Motion to Rehear should be, and the same is hereby, dismissed.

WM. E. MILLER
United States District Judge

APPENDIX C

ORDER

(Received April 17, 1970)

In this habeas corpus proceeding, the Court issued an order on July 29, 1969, to the effect that an evidentiary hearing should be held to determine whether or not there were unconstitutional irregularities in the identification process employed by the police in the instant case. This identification procedure was the primary basis for petitioner's indictment. In ordering such a hearing the Court was particularly concerned with the validity of the so-called "show up" identification method as it was used by police and, also, the reliability and validity of voice identification procedures utilized in the instant case. A hearing on these issues was held on October 30, 1969, and supplemental briefs were filed by both parties to the action several weeks later.

Before reaching the merits of petitioner's claims, a brief statement of the facts is in order. Petitioner, Archie Nathanel Biggers, when 16 years of age was convicted on a charge of rape in a jury trial and sentenced to 20 years in prison. On appeal to the Supreme Court of Tennessee, the conviction was affirmed. **Biggers v. State**, 219 Tenn. 553, 411 S. W. 2d 696 (1967). The case was then accepted for review by the Supreme Court of the United States on a writ of certiorari. **Biggers v. Tennessee**, 390 U. S. 404 (1968). Again, the conviction was affirmed. However, the affirmation was the result of an equally divided court and, therefore, did not amount to an adjudication of the merits of petitioner's claims so as to prevent him from bringing the instant habeas corpus action. [See the May 12, 1969 Order entered by this Court in the instant case; and also see, **Etting v. Bank of the United States**, 24 U. S. 59 (1826).]

The pertinent operative facts in light of the issues raised in the current proceeding are as follows. On the evening of January 22, 1965, Mrs. Margaret Beamer was attacked at knife-point by an intruder who broke into her home. Mrs. Beamer's screams aroused her thirteen-year old daughter who rushed to the scene and also began to scream. At this point, the intruder is alleged to have said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." This Mrs. Beamer did, whereupon she was taken from the house to a spot two blocks away and raped. The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice.

Over a seven month period following the crime the police showed Mrs. Beamer various police photographs and had her attend several "line-ups" and "show-ups." However, the victim was unable to identify any of the persons shown to her as being her assailant. Finally, on August 17, 1965, petitioner was arrested as a suspect in the rape of another woman. While petitioner was being detained in connection with that case the police asked Mrs. Beamer to come to the police station to "look at a suspect." The identification process employed at this point was called a show-up. In this type of identification procedure, the suspect appears before the victim alone rather than in the company of others. The victim therefore does not have to attempt to choose one person from a group of persons presented to him, as in a line-up, but rather the victim knows that the person presented to him for identification is one whom the police suspect of having committed the crime. At the instant show-up Mrs. Beamer identified petitioner as being her assailant. As to what transpired at the show-up, there is some conflict between the Testimony given by Mrs. Beamer at the

trial and that given by her at the evidentiary hearing held in this court on October 30, 1969. In testimony given at the trial, Mrs. Beamer testified that on viewing the petitioner the "first thing" that made her think he might be her assailant was his voice. However, at the October hearing, Mrs. Beamer testified that she identified petitioner positively prior to having him speak the words spoken by Mrs. Beamer's attacker more than seven months earlier during the crime—"You tell her to shut-up or I'll kill you both." There is also conflict between the testimony given by police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words.

At any rate, petitioner was identified at this show-up as being Mrs. Beamer's attacker, and the subsequent indictment and conviction of petitioner was based almost exclusively upon this station house identification.[1]

Turning now to a consideration of the legal consequences attaching to the identification process described above, the basic issue to be dealt with may be defined as follows: was petitioner subjected to a type of identification procedure, namely the show-up confrontation, which was so unnecessarily suggestive and conducive to irreparably mistaken identification as to have the effect of denying due process of law to the petitioner? There are relatively few cases dealing with this issue and the validity of the show-up identification process in the light of due process considerations. However, the teachings of this small body of law point the way for decision of the issue now before the Court.

---

[1] There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive-in-court identification of petitioner at the time of the trial.

It is well settled that in the absence of exceptional circumstances any identification procedure, whether in the nature of a show-up or a line-up, employed without giving the suspect the right to have counsel present constitutes a denial of due process. **United States v. Wade,** 388 U. S. 218 (1967); and, **Gilbert v. California,** 388 U. S. 263 (1967). Though petitioner in the instant case was not provided with the advice of counsel, the rule of **Gilbert** and **Wade** has no application here since that rule was not given retroactive effect. **Stovall v. Denno,** 388 U. S. 293 (1967). The **Stovall** decision makes it clear, however, that aside from the right to counsel, a suspect also has the right not to be subjected to police identification procedures which are so unfair, given the "totality of the surrounding circumstances," as to present a significant possibility of irreparably mistaken identification. Where such faulty procedures are employed, they present a "recognized ground for attack upon a conviction. . . ." See, **Stovall v. Denno,** *supra* at 302; **Simmons v. United States,** 390 U. S. 377 at 383 (1967); and **Palmer v. Peyton,** 359 F. 2d 199 (4th Cir., 1966). In light of these general principles, Mr. Justice Douglas succinctly stated the issue involved here in his dissenting opinion in the earlier consideration of petitioner's case by the Supreme Court of the United States. He pointed out that whether or not the procedure by which Mrs. Beamer identified petitioner denied him due process of law "must be evaluated in light of the totality of the surrounding circumstances" with the view of determining if the procedure in petitioner's case "was so unduly prejudicial as fatally to taint his conviction." **Biggers v. Tennessee,** 390 U. S. 404 at 406 (1967).

The show-up identification process is, as the expert witness for petitioner testified, a far less reliable method of identification than the line-up method. The fact that this is so has been given judicial recognition. In **Wise**

v. United States, 383 F. 2d 206 (D. C. Cir., 1967); and **Wright v. United States**, 404 F. 2d 1256 (D. C. Cir., 1968), it was stated that "the presentation of only one suspect in the custody of the police raises problems of suggestibility that brings us to the threshold of an issue of fairness." See also, **Biggers v. Tennessee**, *supra* at 407-408; and, **Stovall v. Denno**, *supra* at 302. See also, **Wall, Eye Witness Identification in Criminal Cases**, 26-40, and Paul, "**Identification of Accused Persons**," 12 Austl. L. J. 42, 44 (1938) (as cited by Mr. Justice Brennan in the majority opinion in **Stovall v. Denno**, *supra*.)

The problem intrinsic in the show-up identification process is perhaps best stated as follows:

> whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect **this** man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections. **Biggers v. Tennessee**, *supra* at 407 (Justice Douglas' dissent).

However, the use of the show-up process is not *per se* unconstitutional. Where special circumstances such as an urgent need for rapid identification are present, show-ups are allowable. For example, in **Stovall**, the Court found that the show-up was permissible and within the bounds of due process where the procedure was conducted in the hospital room of the victim who was at the point of death following a stabbing attack. Clearly, in that case, there was no time to conduct a line-up and the urgency of the situation demanded that if any eye-witness identification was to be obtained at all it had to be obtained by the show-up method. The "totality of

surrounding circumstances" was such that the show-up was found to be permissible.

Aside from the urgent sort of deathbed situation which occurred in the **Stovall** case, thorough analysis of case law in the area reveals certain other sets of circumstances in which a show-up has been held permissible. For example, courts have upheld the constitutionality of the show-up where the witness had "an unusually good and sustained opportunity to view the participants in the commission of the crime. The theory of the courts is that this particular circumstance makes it unlikely that a show-up would lead to misidentification. **See, United States ex rel. Garcia v. Follette**, 417 F. 2d 709 (2d Cir., 1969); **Macklin v. United States**, 409 F. 2d 174 (D. C. Cir., 1969); **United States ex rel. Rutherford v. Deegan**, 406 F. 2d 217 (2d Cir., 1969); **Cline v. United States**, 395 F. 2d 138 (8th Cir., 1968); and **Hanks v. United States**, 388 F. 2d 171 (10th Cir., 1968). Show-ups have also been given court approval where the confrontation between the witness and the accused occurs "so near the time when the alleged crime was committed" that the chance of misidentification is minimal. The time period within which the show-up may be permissible ranges from a few hours to a few weeks. **See, United States ex rel. Williams v. LaValle**, 415 F. 2d 643 (2d Cir., 1969); **Stewart v. United States**, 418 F. 2d 1110 (D. C. Cir., 1969); **United States ex rel. Anderson v. Mancusi**, 413 F. 2d 1012 (2d Cir., 1969) (suspect identified within hours of crime); **Clark v. United States**, 408 F. 2d 1230 (D. C. Cir., 1968) (suspect identified within a few weeks and a "very positive spontaneous identification" by the witness); and, **Bates v. United States**, 405 F. 2d 1104 (D. C. Cir., 1968). Also, where the show-up was conducted following other independent identification by the witness (i. e., photographic identification), or a particularly good description of the participant in the criminal act, courts have tended

to approve the procedure. **See, United States v. Thompson,** 417 F. 2d 197 (4th Cir., 1969).

While the show-up has been approved within the context of the four situations described above, the courts have zealously guarded the rights of the accused where the show-up procedure was conducted in a manner so suggestive and conducive to irreparably mistaken identification as to amount to a denial of due process. For example, a show-up was expressly disapproved where a witness was shown a lone suspect and asked, "Is this the man?" In this situation, the court stated that the words and actions of the police in contriving the show-up clearly indicated to the witness that the police thought this suspect had committed the crime, thereby contributing to a "mutual reinforcement of opinion" likely to lead to mistaken identification. See, **Clark v. United States,** 294 F. Supp. 44 (D. D. C., 1968). In another case, a Circuit Court of Appeals upheld the holding of a federal district judge that a cell block confrontation between a witness and a suspect was unnecessarily suggestive and therefore the identification obtained from the show-up could not be introduced at the trial. That show-up was objectionable on due process grounds because the suspect had been presented alone to the witness in a screened-off portion of the jail and the witness knew beforehand that the suspect was considered by police to be the culprit. **See, Clemons v. United States,** 408 F. 2d 1230 (D. C. Cir., 1968); **and see also, United States v. Gregg,** 414 F. 2d 943 (7th Cir., 1969).

In yet another case, a show-up identification was disallowed because the identifying witness did not have the opportunity to obtain a good view of the participants in the crime. **See, United States v. Gilmore,** 398 F. 2d 679 (7th Cir., 1968). The hesitancy of a witness to make a positive identification in a show-up has also been said to indicate the type of misidentification danger which would contravene constitutional requirements of due process.

These cases make it quite clear that while a show-up is constitutionally acceptable in certain situations, courts will look carefully at the factual situation surrounding the show-up to determine whether or not the procedure was conducted in such a manner as to violate due process requirements. Courts also have looked to the surrounding circumstances to determine whether or not a line-up should have been conducted rather than the show-up with its attendant dangers of misidentification. For example, where police custody is involved, it has been held that the need for a formal line-up may not be circumvented by keeping a suspect away from the stationhouse until an informal show-up confrontation can be contrived. **See, United States v. Venere**, 416 F. 2d 144 (5th Cir., 1969).

The **Stovall** case and the cases discussed immediately above make it clear that while the practice of showing suspects singly to witnesses for identification is widely condemned, each case of this type must be judged on its own facts and that convictions based on show-up identifications will be overturned only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. **See, Simmons v. United States**, 390 U. S. 377 at 384 (1967). Though the show-up is clearly a less reliable method of identification than the line-up, it is necessary in some circumstances and this Court does not subscribe to a rule that would prohibit its use as a matter of constitutional requirement. However, the "totality of surrounding circumstances" must be examined closely in this case to determine whether special circumstances or exigencies such as those described above existed which would warrant the use of the show-up instead of the more reliable line-up procedure.

On this basis the Court must conclude that the circumstances here present are not such as to warrant the show-up procedure and, consequently, that its use at peti-

tioner's trial denied him due process of law. Respondent, arguing in support of the use of the show-up procedure, relies chiefly on the contention that a show-up was actually fairer to petitioner than a line-up would have been since no prisoners were readily available in either the Metro Jail or the juvenile home whose general description matched that of petitioner. To have conducted a line-up under these circumstances, contends respondent, would have had a greater tendency to cause a misidentification because in a dissimilar group the physical characteristics of petitioner, whose general description matched that of Mrs. Beamer's assailant, would have been unduly accentuated. This argument has perhaps some value but it is at best debatable. According to expert testimony produced by petitioner's attorney, a line-up where no one had physical characteristics similar to petitioner would have been less preferable than one where members of the group all had certain similar characteristics but, in any event, would be preferable to a show-up. This conclusion is derived from the belief that any line-up would be a better test of the victim's memory since it would demand the exercise of some selectivity in identification. Furthermore, there is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screening of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process. Here, there was no evidence of any deathbed urgency as in **Stovall** which would have precluded the police from delaying the identification procedure until a suitable line-up could have been arranged. The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate show-up rather than a

much more reliable line-up. Furthermore, none of the other circumstances which the above discussed cases indicate may justify a show-up existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime.[2] Also, the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission.[3] Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant.[4] The nature of the show-up as conducted in this case—with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner,[5] the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant,—tended to maximize the possibility of misidentification of the petitioner. True, it may have been more convenient for the police to have a show-up. However, in matters of constitutional due process where police convenience is balanced against the need to extend basic fairness to the suspect in a criminal case, the latter value should always outweigh the former. In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected.

---

[2] The only other eye-witness, Mrs. Beamer's daughter could not identify Biggers. **And see**, the case of **United States ex rel. Garcia v. Follette**, *supra* and accompanying text and cases.

[3] See the case of **United States ex rel. Williams v. LaVallee**, *supra*, and accompanying text and cases.

[4] See the case of **United States v. Thompson**, *supra*, and accompanying text and cases.

[5] See **United States v. Gilmore**, *supra*, and accompanying text.

Due process of law and basic fairness demand that the most reliable method of identification possible be used in a criminal case. **See, Simmons v. United States**, *supra*, at 383-384. The conduct of the show-up in this case created an atmosphere which was so suggestive as to enhance the chance of misidentification and hence constituted a violation of due process.

Clearly, this identification did not amount to a harmless error, since the victim's identification of petitioner was virtually the only evidence upon which the conviction was founded. **See, Chapman v. California**, 386 U. S. 18 (1966).

In view of this conclusion, the Court finds it unnecessary to reach the issue of whether voice identification as used here amounted in itself to a violation of due process. It may be that the validity of such identification should normally be left to the jury. Since the voice identification took place during the show-up and the show-up procedure itself is unconstitutional as employed in this case, there is no reason to reach the specific issue raised concerning voice identification.

Accordingly, judgment will be entered granting the application of Archie Nathaniel Biggers for a writ of habeas corpus, voiding the conviction obtained in the state court, and discharging the petitioner from custody after the state has had a reasonable time to retry him upon the same charge, any such new trial to be "unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place." **Biggers v. Tennessee**, *supra*, at 409.

WM. E. MILLER
United States District Judge

APPENDIX D

In the District Court of the United States
For the Middle District of Tennessee
Nashville Division

Archie Nathaniel Biggers

v.

Lake F. Russell, Warden
Tennessee State Penitentiary,
Nashville, Tennessee

} Civil No. 5120

ORDER

(Filed July 29, 1969)

In this habeas corpus proceeding, the Court remains of the opinion, expressed in its Order entered on May 12, 1969, that an evidentiary hearing is required to determine the issues in this cause. After reviewing the transcript and briefs, the Court desires open court testimony on the following matters: the nature of the "show-up" identification process as opposed to the "line-up" identification process, and why the former process was employed in the instant case; and, the general reliability of voice identification procedures, and their relative importance compared with other methods of identification in linking the petitioner to the offense alleged in the instant action.

It is ORDERED that an evidentiary hearing, confined to these issues, be set by the Clerk at the earliest time consonant with the Court calendar.

WM. E. MILLER
United States District Judge

(Seal)

APPENDIX E

In the District Court of the United States
For the Middle District of Tennessee
Nashville Division

Archie Nathaniel Biggers,
Petitioner,

v.

Lake F. Russell, Warden,
Tennessee State Penitentiary,
Respondent.

Civil No. 5120

ORDER

(Filed May 12, 1969)

This action involves a motion by the respondent to dismiss the petition for writ of habeas corpus filed by Archie Nathaniel Biggers. The petitioner was convicted of rape in the Criminal Court of Davidson County, Tennessee, in 1965. The judgment was affirmed by the Supreme Court of Tennessee and then by an equally divided Supreme Court of the United States early in 1968. Biggers has now petitioned the Court for a hearing on his writ of habeas corpus, pursuant to 28 U.S.C. § 2241.

Respondent maintains that the constitutional questions here raised by the petitioner have been fully considered and decided adversely to him by the United States Supreme Court. It is the position of the respondent that the Court should not, therefore, redetermine the same issues.

Though the present case has been argued before the Supreme Court, the decision of that Court is without

force as precedent. When the Supreme Court is equally divided as to the outcome of a case, the judgment is automatically affirmed without opinion. Etting v. Bank of the United States, 24 U.S. 59 (1826). Had there been a more conclusive decision regarding the legal questions in the present case, the Court could easily decline any further review. There would be little reason for the Court to rehear arguments previously rejected by the highest judicial authority. But the Supreme Court did not settle the merits of this case, and affirmed only through an equal split in opinion. The Court therefore concludes that it is not precluded from hearing evidence on the petitioner's allegations, and the respondent's motion to dismiss is hereby denied.

The Court being of the opinion that an evidentiary hearing is required to determine the factual issues in this cause, it is ORDERED that a hearing be set by the Clerk at the earliest time consonant with the Court Calendar. Any analysis of the merits of the petitioner's contentions will be deferred until after the evidentiary hearing.

WM. E. MILLER

(Seal) United States District Judge

APPENDIX F

No. 237. ARCHIE NATHANIEL BIGGERS, Petitioner, v. TENNESSEE, 390 U.S. 1037.

April 22, 1968. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

Former Decision, 390 US 404.

APPENDIX G

*[390 US 404]

*ARCHIE NATHANIEL BIGGERS, Petitioner,

v

STATE OF TENNESSEE

390 US 404, reh. den. 390 US 1037

[No. 237]

Argued January 15, 1968. Decided March 18, 1968.

• • • • • • •

Appearances of Counsel

Michael Meltsner argued the cause for petitioner.

Thomas E. Fox argued the cause for respondent.

Per Curiam.

The judgment below is affirmed by an equally divided Court.

Mr. Justice Marshall took no part in the consideration or decision of this case.

Mr. Justice Douglas, dissenting.[1]

Petitioner was indicted for a rape committed when he was 16 years old, was convicted, and after a trial by a jury sentenced to 20 years, first to a juvenile facility and later to prison. The Supreme Court of

[1] As respects the practice of Justices setting forth their views in a case where the judgment is affirmed by an equally divided Court, see Communications Assn. v. Douds, 339 US 382, 412-415, 422; Osman v. Douds, 339 US 846, 847; In re Isserman, 345 US 286, 348 US 1; Raley v. Ohio, 360 US 423, 440; Eaton v. Price, 364 US 263, 264.

*[390 US 405]

Tennessee affirmed *the judgment of conviction. Biggers v State, 219 Tenn 553, 411 SW2d 696.

On the night of January 22, 1965, Mrs. Beamer was at home sewing, when an intruder with a butcher knife in his hand grabbed her from the rear. Her screams brought her 13-year-old daughter, who, arriving at the scene, also started to scream. The intruder said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." Mrs. Beamer ordered her daughter to a bedroom, and the intruder took Mrs. Beamer out of the house to a spot two blocks away and raped her.

During the next seven months the police showed Mrs. Beamer numerous police photographs, one of which, she said, showed a man who "had features" like the intruder. The case lay dormant. Mrs. Beamer was unable to describe the rapist other than to state he was fat and "flabby," had a youthful voice, smooth skin, and "sort of bushy" hair.

On August 17, 1965, petitioner, still only 16 years old, was arrested for the rape of another woman. On the same day the police brought Mrs. Beamer to the police station to "look at a suspect." They brought petitioner to the doorway of the room where she sat. She asked the police to have him speak and they told him to repeat the words spoken by the rapist, "Shut up, or I'll kill you." Only after he had spoken did Mrs. Beamer identify petitioner as the man who had raped her; she testified that it was petitioner's voice that "was the first thing that made me think it was the boy." So far as the record indicates, at the time of this confrontation neither the parents of petitioner nor any attorney acting for him had been advised of the intended meeting with Mrs. Beamer.

The indictment followed. At the trial the daughter testified to what she had seen the evening of the rape, but was unable to identify petitioner as the rapist. The only evidence connecting him with the

*[390 US 406]

rape was Mrs. *Beamer's stationhouse identification. She did not identify him in the courtroom.[2] She testified that she had identified him by his size, his voice, his smooth skin, and his bushy hair. Three of the five police officers who were present at the identification testified over objection in corroboration of Mrs. Beamer's reaction at the confrontation.

This procedure of identification violates, of course, United States v Wade, 388 US 218, and Gilbert v California, 388 US 263. Those were cases of lineups and this was not. Yet, though they recognized a suspect's right to counsel at that critical stage, the Court announced they would not have retroactive effect.

Stovall v Denno, 388 US 293, and Simmons v United States, 390 US 377, make it clear, however, that independent of any right to counsel claim, a procedure of identification may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law is denied when evidence of the identification is used at trial. Stovall v Denno, supra, at 302. The claim that Mrs. Beamer's identification of petitioner falls within this rule "must be evaluated in light of the totality of sur-

[2] Respondent contends that Mrs. Beamer made an in-court identification of petitioner as the rapist. But the portions of the record relied on do not support this claim. After Mrs. Beamer had described the station-house identification, the prosecutor asked her, "Is there any doubt in your mind today?" She replied, "No, there's no doubt." The inference to be drawn is that Mrs. Beamer had no current doubt as to the correctness of her previous identification of petitioner at the police station.

rounding circumstances'' with the view of determining if the procedure in petitioner's case ''was so unduly prejudicial as fatally to taint his conviction.'' Simmons v United States, supra.

In Simmons, identification by use of photographs rather than a lineup was upheld because the bank

*[390 US 407]

robbers *were still at large, the FBI had to quicky determine whether it was on the right track in looking for Simmons, the witnesses' memories were fresh since the robbery was but a day old, and because the photos pictured persons in addition to petitioner. In Stovall, a single-suspect confrontation held in a hospital room was found to comport with due process because the stabbing victim, the sole source of identification, was in danger of death—to have conducted a lineup would have entailed perhaps fatal delay.

We have no such problem of compelling urgency here. There was ample time to conduct a traditional lineup. This confrontation was crucial. Petitioner stood to be free of the charge or to account for it, dependent on what Mrs. Beamer said. Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections.

As noted, in Simmons, where identification was by photograph, the Court stressed that identification was made only a day after the crime while ''memories were still fresh.'' Id. at 1254. Here, however, Mrs. Beamer

confronted petitioner seven months after the rape, and the sharpness of her recall was being severely tested. In Simmons, too, the Court emphasized that the five witnesses had seen the robbers "in a well-lighted bank." Ibid. Here, however, there was "[n]o light in the hall" where Mrs. Beamer was first assaulted; from that hall, the assailant took her out of the house through a kitchen where there was "no light," and the railroad track where the rape occurred was illumi-

*[390 US 408]

nated only by *the moon. Indeed, the best view Mrs. Beamer had of petitioner was in the hall by indirect light from a nearby bedroom.

In Simmons, the record did not indicate that the FBI told the witnesses which of the men in the photographs were suspects. Here, on the other hand, the police told Mrs. Beamer when they brought her to the station house that the man she would see was a "suspect."

Moreover, unlike the Simmons case, identification here rested largely on voice. The fact that petitioner had "the voice of an immature youth" to use Mrs. Beamer's words, merely put him in a large class and did not relate him to speech peculiar to him. Voice identifications involve "grave danger of prejudice to the suspect," as the Court of Appeals for the Fourth Circuit said in Palmer v Peyton, 359 F2d 199, 201. No one else identified petitioner. The daughter could not; and Mrs. Beamer did not identify him in the courtroom. Petitioner was young and apparently had no previous police record. There was no other shred of evidence against him.

Under the circumstances of this case it seems plain that the police maximized the suggestion that petitioner committed the crime.

Of course, due process is not always violated when the police fail to assemble a lineup but conduct a one-man showup. Plainly here, however the highly suggestive atmosphere that had been generated by the manner in which this showup was arranged and conducted could not have failed to affect Mrs. Beamer's judgment; when she was presented with no alternative choices, "there [was] then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect." Palmer v Peyton, supra, at 201. The conclusion is inescapable that the entire atmosphere created by the police surrounding Mrs. Beamer's identification was so suggestive

*[390 US 409]

*that use at trial of her stationhouse identification constituted a violation of due process. Since this was the only evidence of identification, there can be no question of harmless error. See Chapman v California, 386 US 18.

Petitioner is entitled to a new trial unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place. See Gilbert v California, supra, at 272-273.

The fact that petitioner is a Negro, and Mrs. Beamer also, is of course irrelevant to the due process question.

APPENDIX H

NO. 1562, MISC. ARCHIE NATHANIEL BIGGERS, PETITIONER, V TENNESSEE

388 US 909

June 12, 1967. Motion for leave to proceed in forma pauperis and petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, granted. Case transferred to the appellate docket and placed on the summary calendar and set for oral argument immediately following No. 1087.

APPENDIX I

Archie Nathaniel Biggers, Plaintiff in Error,

v.

The State of Tennessee, Defendant in Error.

219 Tenn. 553
411 S.W.2d 696.

(Nashville, December Term, 1966.)

Supreme Court of Tennessee

Opinion Filed January 12, 1967.

Petition for Rehearing Denied March 1, 1967.

• • • • • • • •

From Davidson

• • • • • • • •

Mr. Justice Dyer delivered the opinion of the Court.

Plaintiff in error, Archie Nathaniel Biggers, herein referred to as defendant, appeals from a conviction of rape for which he has been sentenced to serve twenty (20) years in the State Vocational Training School for Boys. Defendant at the time of the crime was sixteen years old.

The victim, Mrs. Margaret Beamer, is a married woman with five children. On the night of 22 January 1965 she was at home in her living room sewing. About 9:00 p.m. she started from her living room to the bedroom, which rooms are separated by a hall, and as she reached the hall defendant, with a butcher knife in his hand, grabbed her

from behind pulling her to the floor. Her screams brought her daughter out of a bedroom into the hall and when the daughter saw what was happening she also began to scream. Defendant said to Mrs. Beamer, "You tell her to shut up or I'll kill you both." Mrs. Beamer ordered the daughter back into the bedroom. Defendant escorted Mrs. Beamer out the back door of the house to a spot about two blocks away where he had sexual relations with her. Upon completion of the sexual act defendant ran away and Mrs. Beamer, returning home, notified police. About 10:15 p.m. on this night Mrs. Beamer was medically examined which revealed she had had sexual intercourse within three (3) hours prior to that time.

During the early hours of 17 August 1965 defendant was arrested for an incident occurring on this night of his arrest and immediately taken to Juvenile Aid. Defendant's mother came to Juvenile Aid and in her presence he was fully advised of his constitutional rights. Later on in the morning defendant was released to the Police Department and Mrs. Beamer, at Police Headquarters, identified defendant as the person who raped her on 22 January 1965.

Defendant as a witness in his own behalf denied any knowledge of the crime. Several witnesses testified to his good character.

The assignments of error are as follows:

1. The evidence preponderates against the verdict of the jury and in favor of the innocence of the accused.

2. The defendant was prejudiced when a witness for the State mentioned other offenses allegedly committed by the defendant for which he was not on trial and for which he had not previously been convicted.

3. The defendant was prejudiced when the Attorney General went outside the evidence in the case while making his final argument to the jury.

4. The defendant was required to give evidence against himself without having been advised of his constitutional rights.

5. The defendant was prejudiced by the action of the Trial Court in refusing to require the State to furnish him a transcript of the trial proceedings.

[1, 2] The first assignment of error is predicated upon the ground the identity of defendant by the victim was so vague, uncertain and unsatisfactory and given under such circumstances as not to have any substantial probative value. This identification was made based upon the defendant's size, voice, skin texture and hair. On identification the trial judge asked the victim, "All right. Is there any doubt in your mind." To which the victim replied, "No, there's no doubt." Identification is a question of fact for the jury. *Stubbs v. State,* 216 Tenn. 567, 393 S.W.2d 150 (1965). The first assignment of error is overruled.

Under the second assignment of error it is alleged Thomas E. Cathey a member of the Metropolitan Police Department, as a witness for the State, mentioned other offenses allegedly committed by defendant. In defendant's brief these references to other crimes are described as being "by inference." We have carefully examined the pages of the transcript cited and find no reference to other crimes. The assignment of error is overruled.

Objection is made, under the third assignment of error, to the following argument by the Assistant District Attorney General:

In many parts of our United States, Gentlemen of the Jury, a case of this nature would never go to trial, and I am sorry to say, its all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she is not considered in those states to have any more rights than a dog and her reproductive organs—".

[3] The argument above was not completed due to objection by defendant which was sustained by the court. The Assistant District Attorney General did not pursue this line of argument further. Both the defendant and the victim were members of the Negro race, a fact, of course, known to the jury. It is insisted, under these circumstances, this argument was an appeal to racial prejudice. We agree this line of argument was improper, but in light of the prompt action of the trial judge we think such was harmless error. The third assignment of error is overruled.

Mrs. Beamer and defendant, for the purpose of possible identification, were brought together at Police Headquarters. Mrs. Beamer requested police have defendant repeat in her presence some of the words her assailant had used at the time of the rape. The words requested were, "Stop or I'll kill you." Defendant, upon instructions of police, repeated these words and Mrs. Beamer bases her identification of defendant as her assailant partly upon his voice. Under the fourth assignment of error it is alleged requiring defendant to speak these words for the purpose of identification violated his constitutional right against self-incrimination.

While the exact problem presented here has not been before this Court, yet we think it is controlled by the logic and reason used by the court in the case of *Barrett*

v. State, 190 Tenn. 366, 229 S.W.2d 516 (1950). The *Barrett* case involved a defendant required to wear a hat at the time he was being identified. This court, rejecting the argument such was a violation of defendant's privilege against self-incrimination, quoted from Wigmore on Evidence, 3 Ed. Section 2265, p. 375 as follows:

> "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of her mind in expressing it, the demand made upon him is not a testimonial one." 190 Tenn. 372, 229 S.W. 2d 519.

A thorough analysis of the problem presented can be found in 8 Wigmore on Evidence, sec. 2265, at pp. 386, 396 (McNaughton, rev. 1961). In analyzing this constitutional privilege Dean Wigmore lists eleven (11) principal categories which he specifically states are not covered. Category No. 7 is; "Requiring a suspect to speak for identification." A number of cases are cited for the proposition a defendant's rights are not violated when he is forced to speak certain words solely for the purpose of identification. See above citation in Wigmore.

[4] In the instant case defendant was told what words to say and in repeating them he did not give any factual information tending to connect him with the crime; nor could any reliance be placed on these words which would indicate defendant was conscious of, or had knowledge of, any facts of the crime. The only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification. Under these circumstances we do not think defendant's constitutional right against self-incrimination was violated. The fourth assignment of error is overruled.

[5] Under T.C.A. sec. 40-2037 et seq. the State is required to furnish to an indigent defendant a transcript

upon request. The trial judge determines if the defendant is indigent and in this case determined defendant was not indigent. We find no error in this determination by the trial judge. The fifth assignment of error is overruled.

Judgment affirmed.

BURNETT, CHIEF JUSTICE, CHATTIN and CRESON, JUSTICES, and HARBISON, SPECIAL JUSTICE, concur.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-685

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

In reply to the Petition for Writ of Certiorari, counsel for respondent, who has made application to proceed in forma pauperis, has filed a thirty-three page brief. Certain arguments are made in that brief to which the petitioner wishes to respond.

ARGUMENT

I.

The District Court did not consider any new evidence.

The identification made by the victim was supplemented by her testimony at the hearing before the District Judge at

which time she stated that she had identified Mr. Biggers at the trial in the courtroom (Brief in Opposition at 10). The only other evidence that the District Judge heard that had any material bearing on the identification was the expert testimony of a professor from the University of Michigan, Dr. Erwin Pollack, who testified as to the general unreliability of eyewitness identification and identification procedures employed by the police. Dr. Pollack's testimony is detailed in the Brief in Opposition at 9-10.

This is not a case where the District Judge heard new material facts which this Court did not hear when the matter was here before for plenary review. The only really new fact that the District Judge heard was the resolution of the question raised by Mr. Justice Douglas in his dissent, which was whether or not Mrs. Beamer identified the Defendant in the courtroom, and Mrs. Beamer testified at the federal habeas corpus hearing that she had. The State has always insisted that Mrs. Beamer identified the Defendant in the Courtroom. During the course of her testimony the prosecutor asked her, "Is there any doubt in your mind today?" She replied, "No, there is no doubt." Mr. Justice Douglas in his dissent argued that this meant that Mrs. Beamer had no doubt in her mind that this was the person that she had identified *in the previous lineup*. The State insisted that there was no doubt in Mrs. Beamer's mind *at the trial* that this was the person who was the rapist.

Despite this testimony and despite the fact that this Court heard plenary argument on the fairness of the identification employed, the District Judge ruled that the stationhouse identification was improper.

II.

The affirmance by this Court of the conviction of petitioner after plenary consideration of the stationhouse identification forcloses further consideration of the very same issue between the same parties.

This Court heard argument on the stationhouse identification. By a four-four decision it affirmed the judgment of the Tennessee Supreme Court. Nowhere in the Brief in Opposition is any mention made of the failure of the lower courts to apply to the facts of this case 28 United States Code Sec. 2244(c), which says that once the Supreme Court of the United States has decided an issue, that decision shall be conclusive "unless the applicant for the writ of habeas corpus shall plead and the Court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the Court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The District Court, Court of Appeals, and counsel for respondent have ignored this statute. The identification question is not a question which did not appear in the record of the proceeding in the Supreme Court. On the contrary, that is what the argument and plenary hearing in the Supreme Court was all about (see the transcript of that oral argument which was filed as a supplement to the Petition for Certiorari).

III.

A four-four affirmance is not a "technical" affirmance.

The District Judge and respondent's counsel (Brief at 17) speak of this Court's affirmance of the Supreme Court

of Tennessee as a "technical" affirmance. The District Judge even made reference in one of his orders to a "technical affirmation which results from the fortuitous circumstance of an equally divided court." (Appendix at 40)

It is true, as this Court said in *Sanders v. United States*, 373 U.S. 1, 8 (1963), that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Yet, if this Court allows the result reached in the two to one decision of the Court of Appeals to stand, the result will fly in the face of 28 United States Code Sec. 2244(c), and the result reached by the Supreme Court of Tennessee and affirmed by this Court.

CONCLUSION

Because the lower courts' decisions have not only set aside an affirmance by this Court but because they also have had the effect of holding unconstitutional a federal statute, this Court should grant certiorari and give plenary consideration to the issues raised.

Respectfully submitted,

BART C. DURHAM, III
Assistant Attorney General
State of Tennessee
211 Supreme Court Building
Nashville, Tennessee 37219
Telephone: (615) 741-2091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-685

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,

Respondent.

MOTION FOR LEAVE TO SUPPLEMENT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

The Petitioner, William S. Neil, Warden, Tennessee State Prison, moves the Court to be allowed to file as Appendix "J" to his Petition for Certiorari the transcript of oral argument before this Court in *Biggers v. Tennessee*, No. 237, Oct. Term 1967, argued January 15, 1968.

No transcript of the argument was made, but Petitioner has obtained with the permission of the Marshal of this Court a copy of the tape recording of the argument from the National Archives and Records Service.

This transcript is submitted in support of Petitioner's argument that, in the words of Mr. Meltsner, counsel for Mr. Biggers, in his opening remarks, "the primary question in this case is whether the total circumstances surrounding petitioner's identification, and its use at trial, violated the due process clause of the Fourteenth Amendment . . ." This is precisely what Petitioner contends this Court considered and decided.

Petitioner has been as diligent as possible in getting this supplementary material together. He wrote the Clerk of this Court on September 10, 1971, requesting a copy of the transcript. Mr. W. V. Gullickson, Assistant Clerk, wrote back on September 17 that "the oral argument in that case was not transcribed." He wrote the Marshal for permission to secure the tape on October 14. He received a communication dated October 21 from Mr. James W. Moore, of the National Archives advising that the sound recording could be purchased. A few days later the sound recording was obtained. The same was approximately 58 minutes and was transcribed and corrected several times to insure accuracy.

WHEREFORE, Petitioner PRAYS that he be allowed to supplement his Petition for Certiorari with the transcript of oral argument heretofore described and hereto attached, and that the same be filed as Appendix "J" to the Petition.

Respectfully submitted,

BART C. DURHAM, III
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219
Telephone: (615) 741-2091

APPENDIX "J"

SUPREME COURT OF THE UNITED STATES
No. 237, O. T. 1967

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

TENNESSEE,
Respondent.

TRANSCRIPT OF ORAL ARGUMENT

JANUARY 15, 1968

APPEARANCES:

Michael Meltsner, Esq.
New York, New York for Petitioner

Thomas E. Fox, Esq.
Nashville, Tennessee for Respondent

[1] THE CHIEF JUSTICE: No. 237, Archie Nathaniel Biggers, Petitioner, v. Tennessee. Mr. Meltsner.

MR. MELTSNER: Mr. Chief Justice, may it please the Court. This case is here on writ of certiorari to the Supreme

Court of Tennessee to review a sixteen-year-old boy's conviction and sentence to twenty years in prison for the crime of rape. Because the primary question in this case is whether the total circumstances surrounding petitioner's identification, and its use at trial, violated the due process clause of the Fourteenth Amendment, I intend to state the facts in some detail. On the night of January 22, 1965, Mrs. Margaret Beamer, a Negro nurse, was sewing in the living room of her Nashville, Tennessee, home. A twelve-year-old daughter was in a bedroom, listening to phonograph records, and a six-year-old son was asleep in another bedroom. The living room was lit by a single lamp, and the lights were off in an adjoining hallway and kitchen. At about 9:10 p.m., Mrs. Beamer rose and entered this hallway. She was grabbed from behind and pushed to the floor by an intruder holding a long butcher knife. She began to scream and sob, and her twelve-year-old daughter came to the door of the adjacent bedroom and also began to scream when she saw her mother and the assailant. The intruder then said, "Shut up, or I'll kill you both" to the women and he had Mrs. Beamer order her daughter back into the bedroom. He then forced her to walk through an unlit kitchen, out behind the house, up an embankment to some railroad tracks, and took her to a place in the woods where he raped her. The only light behind the house came from the moon, street lights which were located in front of the light . . . in front of the house. There were no lights on the tracks.

THE COURT: Does the record show how old this woman was?

[2] MR. MELTSNER: The only place it does is in a newspaper story introduced in evidence by the prosecution; I believe she is thirty-nine from that . . . that story.

These events lasted from ten to thirty minutes at the most. And Mrs. Beamer testified that throughout she was frightened, in fear, and crying. After the rape, the rapist ran away and Mrs. Beamer reported the crime to the police. After she did this, at dates and times and under circumstances which the record does not particularly reveal, she was shown thirty or forty photographs from police files and saw several suspects at headquarters. However, the record is quite clear that she never was shown the petitioner in this case at these viewings.

THE COURT: Now, let's see, what, what was the date of the incident?

MR. MELTSNER: The date of the incident was January 22, 1965.

THE COURT: And what was the period over which she was shown these photographs?

MR. MELTSNER: The record does not say. The on . . . she was shown these photographs but at no time did the State introduce evidence showing the dates, how long over the period of time between the crime and the eventual identification proceeding.

THE COURT: But the record does show, you say, that none of the confrontations, whether by photograph or otherwise, until she identified this petitioner, was this petitioner?

MR. MELTSNER: Quite, quite clearly. She was asked at one point, "Did you know who raped, who raped you before the pre-trial identification?" She said, "No." The police officer testified that he had never shown photographs of

the petitioner to her. The petitioner took the stand, was not cross-examined about a criminal record . . .

[3] THE COURT: When, when did they pick the petitioner up?

MR. MELTSNER: Well, that took place, that took place seven months later on . . .

THE COURT: By later you mean August . . .

MR. MELTSNER: In August of 1965.

THE COURT: Did the police show this woman pictures . . . other pictures at various times and with the result that she failed or refused to identify any of the other pictures as her assailant?

MR. MELTSNER: She was shown some thirty or forty photographs.

THE COURT: Prior to the time when she was shown the batch of photographs that included the petitioner?

MR. MELTSNER: No, the photographs she was shown did not include the petitioner. She was shown thirty or forty photographs from police files. She was never shown a picture of the petitioner. The record does not show whether she saw these photographs the day after the crime or a week after the crime, although, I must confess, my reading of the record, it certainly seems to be that way. That's the impression. But certainly the record doesn't . . . is really . . . is not clear on this point.

THE COURT: Yes. But in any event, she was shown some photographs of some

people, and she failed or refused to identify any one of them as her assailant?

MR. MELTSNER: She did see one person who she said had features like the rapist. But other than that she identified . . .

THE COURT: You mean she saw a person in person or she saw a photograph?

[4] MR. MELTSNER: It's not clear whether it was a direct viewing or through a photograph, as I recall.

THE COURT: You mean the indications are that she knew what the features of the rapist really were like?

MR. MELTSNER: All . . . She said that one person had features like the rapist. Now when she gave a description to the police at the time the crime was reported, a police officer wrote down what she said, and he described it as, "She told me as best she could," and he wrote it down, and this came out in the course of the trial. The State never offered this contemporaneous description or the record of it into evidence at the trial nor did Mrs. Beamer ever testify as to the . . .

THE COURT: Nor did she ever say that the . . . that this defendant's features were like those she remembered in the rapist?

MR. MELTSNER: That's correct, that's correct. She talked totally in terms of the pre-trial identification, almost totally. She never referred back to the crime . . .

THE COURT: That was only by voice?

MR. MELTSNER: Pardon me.

THE COURT: That was only by voice?

MR. MELTSNER: Well, she didn't identify him until he spoke. He was called into a room. She was sitting there with five police officers, but there was no lineup, and she then requested the police to have him speak. And she said, "Have him say, 'Shut up or I'll kill you.'" And a police officer said, "Say it, say it, boy," and he hesitated, and he said, "Say it," and then the petitioner said, "Shut up or I'll kill you."

THE COURT: How old was the petitioner?

[5] MR. MELTSNER: Sixteen.

THE COURT: At that time?

MR. MELTSNER: At that time.

THE CHIEF JUSTICE: How did the description that she gave at the beginning compare with this petitioner? You may answer that after lunch.

(Recess)

THE COURT: You may continue your argument.

MR. MELTSNER: To answer the question you asked before the recess, Mr. Chief Justice, at trial a police officer revealed that a written report of Mrs. Beamer's description had been taken down at the time she reported the crime, but the State never offered this description into evidence nor did Mrs. Beamer testify about the character of her initial description. Now, seven months . . .

THE COURT: And that's not on the record at all?

MR. MELTSNER: The only thing on the record is that a description was taken down and not offered. That appears on page 50 of the record. I think under accepted . . . to get ahead to my argument, under accepted canons the fact that the State failed to offer this report must be taken to harm rather than help the State's case for Mrs. Beamer's reliability. Seven months after the crime, on the night of August 16, 1965, a Nashville woman was assaulted. The police arrested petitioner, Archie Biggers, a sixteen-year-old Negro with no previous record of trouble with the police as he was receiving medical attention at a local hospital.

THE COURT: For what?

[6] MR. MELTSNER: The newspaper stories, which are the only source of information in the record, state that he claimed he had been cut, and he was with his mother at the hospital. The police arrested him and took him to a juvenile detention facility. His mother was with him, and she was told of what the record only characterizes as his "rights". And the police announced to the newspapers that they were going to question him about a series of rapes. The following day, two police officers went to Mrs. Beamer's home, told her that they had a suspect they wanted her to look at, and brought her to police headquarters. She was seated in a room with five police officers, but no lineup was held. Petitioner was brought to the door of the room, and after looking at him, she asked the police to have him speak and after he spoke these words of the assailant, "Shut up or I'll kill you," she identified him. His mother, father, and retained attorney were not present.

THE COURT: Why did he use those words?

MR. MELTSNER: Because he was told to say them by the police. Biggers was . . .

THE COURT: . . . . .

MR. MELTSNER: . . . that his . . .

THE COURT: At this time the words spoken by the assailant, and he spoke them?

MR. MELTSNER: Yes.

THE COURT: Seven months before?

MR. MELTSNER: Seven months before. Biggers was indicted with rape . . . indicted for rape, a capital offense in Tennessee. But at trial the only evidence tying him to the crime, was Mrs. Beamer's testimony on direct examination, that she had identified him in August, at the police station, and that he spoke the words of the rapist. [7] At first, she denied ever having seen him. That appears on page 9 of the record. She then changed the . . . her, the course of her testimony and described the pre-trial identification.

THE CHIEF JUSTICE: Let's see. What? Would you repeat that again? She first said she had not seen . . .?

MR. MELTSNER: She was . . . she was . . . she was asked on page 9 of the record by the prosecuting attorney, "Now getting to the central facts of this case, "Have you ever seen the defendant before?" She said, "No." She then changed the course of her testimony and described the pre-trial identification. Four policemen also testified on direct . . .

THE COURT: Well, you, . . . that . . . you don't really read that part of the transcript to indicate she, that was testimony that she didn't recognize the defendant?

MR. MELTSNER: I think it reflects on her certainty. This is a due process case and in a sense everything counts, and the fact that she . . .

THE COURT: No, no, no. Things that don't count, don't count, and . . .

MR. MELTSNER: Well, I think it counts that the first answer was "No".

THE COURT: The first an . . . What do you suppose she understood this question to mean?

MR. MELTSNER: Well, it was asked twice in two different ways and both times . . .

THE COURT: Where's the other place?

MR. MELTSNER: Right, two or three lines below it, "Was the defendant at any time at your home?" "If he was I didn't see him." It's an extremely peculiar first response and I grant Your Honor it's totally inconsistent to the weight of her testimony.

[8] THE COURT: . . . in context, it seems was saying that to me, perhaps I'm wrong, that Mrs. Biggers in between the time of the assault upon her and trial, she had not seen the defendant. Otherwise, the whole thing in nonsense.

MR. MELTSNER: It may be that's what she meant, but I don't think the question's directed to that, in terms at least.

THE COURT: What do you think she meant? I'm like my Brother Fortas, I don't see why you should make anything out of that.

MR. MELTSNER: Well, I don't think it's a big point, but does . . . I do think it reflects on her certainty.

THE COURT: What do you think she said?

MR. MELTSNER: I think she was she . . . perhaps was uncertain or confused at the trial. But if she was a person who could have been upset and confused easily, that reflects on her reliability . . .

THE COURT: Don't you really think that what she was saying was before that night, if he'd ever been in my house I never—don't recall him. Wasn't that what she was saying? I don't know why you press that at all, really.

MR. MELTSNER: Well, I—I'll leave it, and get on to the trial where her testimony was totally uncorroborated. The State did offer the testimony of four police officers on direct examination that Mrs. Beamer had identified Biggers at the police station, although the fact of this identification had not been challenged. And the twelve-year-old daughter was unable to identify him. The State claims in its brief that Mrs. Beamer identified Biggers in the courtroom. We dispute this because there is a standard method for identi-

fying a defendant in the courtroom, picking him out, and it wasn't used in this case. A final occurrence at trial . . .

[9] THE COURT: His, Biggers' counsel objected, on page 19, to asking her to identify him again, said he's already done it. "Is there any doubt in your mind today?" Mr. Williams, who I guess was his counsel, says, that "he has asked her that before, Judge, we are going to object to it." The Court says, "All right, is there any doubt in your minds?" And Mrs., the victim, said, "No, there is no doubt."

MR. MELTSNER: Well, I think he was, I think he was objecting to the repetitious nature of that.

THE CHIEF JUSTICE: Repetitiousness of what? Of her identification of him in the courtroom?

MR. MELTSNER: Oh. Is there any doubt in your mind, I, excuse me, I misunderstood the question. I think they are, again, referring to the pre-trial identification. The identification in the courtroom is a question of locating a body among other bodies, not a question of saying the defendant's name. One can . . . talk about a person without knowing exactly who he is. I think there is an important reason why this shouldn't be inferred from the record, not that it's particularly important to this case because the burden of her testimony was of the pre-trial identification. It's important that a witness has to commit him or herself, because in that, that way they're responsible, and any doubts they have are expressed in that way.

THE COURT: At the bottom of page 18, she compares the way he looked at the time of the rape and the way he looks in the courtroom.

MR. MELTSNER: As I read . . .

THE COURT: "That his hair was a little longer."

MR. MELTSNER: As I read that, it's a comparison between the way he looked in the courtroom and the way he looked at the pre-trial identification.

THE COURT: Well, what it says is that, "Yes, the hair. A little longer than it is now." And, "Now" is in the courtroom. That's the bottom of page 18.

[10] MR. MELTSNER: And the question is, whose hair? There is a standard method for identifying someone in the courtroom that just wasn't used here. But again I don't think that's particularly important . . .

THE CHIEF JUSTICE: What is the import of that question? Whether, whether his hair is a little longer at the trial than it was at the time of the crime or whether it was a little longer at the time of the trial than it was at the time of the pre-trial?

MR. MELTSNER: As I read it, it is a comparison between the time of the trial and the time of the pre-trial identification. Nothing in her testimony goes back to seven months, or nine or ten months at this point, to the crime when she's identifying him. A final occurrence at trial

should be mentioned. At the time of Biggers' arrest and identification, highly prejudicial newspaper accounts appeared, based on police statements to the press. Members of the trial jury had seen these stories and a photograph. The State, at the beginning of trial, asked Mrs. Beamer if she had identified Biggers before or after these newspaper stories appeared, thus making the stories an issue at the trial. It's our position that this case is controlled by the Court's decision in *Stovall*, where a show-up or exhibiting of defendant alone was permitted only because there was no other way to have any identification proceeding. But in this case, a lineup was eminently practical. Petitioner was in custody and continuously available. Mrs. Beamer was available; there was no shortage of persons to hold the lineup. Biggers was taken from the juvenile detention facility to a police headquarters in a large city in the daytime, a city in which there . . . there are approximately 75,000 Negroes, and if some short delay was required, not shown by the record, it would not have been prejudicial because the crime had taken place seven months earlier. The dangers of the show-up procedure are well known. They were mentioned in the Court's opinions
[11] last term. Presenting a man alone says there is reason to believe he's guilty. This is the very question which the identification is supposed to resolve. It also magnifies any similarities between the defendant and the criminal because there is no opportunity for comparison. And it affords no test of recollection. Now these dangers worked a particularly harsh result here because of a number of circumstances. Mrs. Beamer's initial opportunity to observe had been slight. The crime took place in a very short period of time. She never saw the rapist in direct light. Indeed, the State concedes in one of its briefs that it was a limited opportunity, and she

was understandably frightened and in fear of her life. Again, the State concedes she was emotionally upset. Secondly, the gap between the crime and the identification was great and her memory must have faded. And thirdly, she relied on her memory of a voice. She didn't identify him until after he spoke. Memory of a voice is a particularly abstract and unreliable factor on which to base an identification.

THE CHIEF JUSTICE: Is there anything in the record to show what her powers of observation were, what her intelligence was, or what her education was, or anything of that kind? That wasn't questioned at all within the trial . . .

MR. MELTSNER: No.

THE COURT: . . . or was it?

MR. MELTSNER: No.

THE COURT: It was not.

THE COURT: Well, wasn't she a licensed practical nurse?

MR. MELTSNER: That's correct. The lesser opportunity to observe or longer the gap between identification and the crime, the more suggestible she was by means of
[12] a procedure which magnified the similarities between the petitioner and the criminal and told her that the police had evidence against him. Now, into this situation, the police not only failed to use available procedures to protect reliability but they affirmatively corrupted the process of recollection by calling Biggers a suspect and making him say, "Shut up or I'll kill you." The more dramatically a person is tied to the crime, the more

likely an identification will be the product of suggestion that the defendant is the criminal rather than any free recollection of the crime. And nothing which took place at trial increased the reliability of this identification.

THE COURT: Suppose . . .? I beg your pardon. Suppose there had been a lineup, a proper lineup in all respects, and that every person in the lineup had said these words, "Shut up or I'll kill you"?

MR. MELTSNER: Totally different situation. It then would have created a spur to recollection. But here it was just one person doing it, and so, the actor in the role, as so often happens in life, were confused.

THE COURT: So you make no point about requiring the petitioner to say these words, apart from the fact that the confrontation was a single one rather than in a lineup?

MR. MELTSNER: Well, we do have a Fifth Amendment claim about this, Your Honor, which is stated at length in the brief.

THE COURT: I understand you, but I'm asking what your position is? In your last statement, I thought—said was to the effect that if these words had been stated in a lineup, then you wouldn't have a Fifth Amendment point.

[13] MR. MELTSNER: No, I, I, my point is that there is no Fifth Amendment contention left after the *Wade* case, as to speech at a lineup, then the suggestibility of the use of these inflammatory words would not have been directed at this young man if a lineup had been held.

THE COURT: So you're saying that it was the coupling only and only the coupling of the single confrontation with the utterance of the words of the assailant that created the Fifth Amendment problem here?

MR. MELTSNER: It created a Fifth and Fourteenth Amendment problem here.

THE COURT: You mean you're accepting *Wade*?

MR. MELTSNER: Well, we, we . . .

THE COURT: Or, are you just accepting it in order to make this argument? Do you challenge the holding in *Wade*, that it does not violate self-incrimination?

MR. MELTSNER: We don't think . . .

THE COURT: . . . to require a person to make statements to let a witness see if he's the guilty man.

MR. MELTSNER: We don't think we have to because this case involves testimony about . . .

THE COURT: Are you waiving it, are you waiving it?

MR. MELTSNER: No. Absolutely not. Absolutely not. We think the Court should reconsider it and base its decision on the volitional cooperation involved in compelled speech. We don't think that need be reached.

THE CHIEF JUSTICE: Mr. Meltsner, is there anything in the record to indicate what

weight Mrs. Beamer put on her first sight of this man and what weight she put on his voice in determining that he was the assailant?

[14] MR. MELTSNER: The first thing she mentioned when she was asked why she identified him is her . . . is his voice, so I would assume it was a heavy factor. Also, she did not identify him when she saw him immediately. She waited until he spoke.

THE CHIEF JUSTICE: That's all of this in the record.

MR. MELTSNER: Another occurrence at trial which we mentioned is . . . is the State's pointing five fingers at the petitioner rather than one. They just didn't rest on Mrs. Beamer's identification which we assert is tainted, but they had four police officers testify as to it. And as I mentioned earlier, they injected this newspaper story into the record, a factor which must have robbed the jury's capacity to objectively appraise this identification. And all the suggestion here was unnecessary. A lineup could have been held. The officer who called Biggers a suspect had been on the force seventeen and a half years. He should have known better. He didn't have to speak, "Shut up or I'll kill you." He could have been made to speak innocent words, words that didn't tie him to the crime in the same way. His parents and counsel could have been present, and the bolstering of this tainted identification and injection of the newspapers to the case were totally unnecessary trial tactics.

GENERAL FOX: Mr. Chief Justice, Associate Justices, May it please the Court.

THE CHIEF JUSTICE: Mr. Fox.

MR. FOX: I don't think that I'm too much in disagreement with opposing counsel with respect to the facts as

[15] shown by the record or with respect to what the law is. I think the difference is the inferences to be drawn from; I think I draw different inferences from the record from what opposing counsel did and it may be that I have looked at the law a little bit different in this respect. In *Stovall*, as I understand it, the question is, and I think that's the question to be determined, the only question to be determined here, is whether or not the identification proceedings were such as are . . . were so unfair as to amount to a denial of due process. Now what amounts to a denial of due process, I think in any given case depends upon the circumstances. Mr. Justice Frankfurter, in one of his cases, it's the *Joint Anti-Fascist Refuge Committee v. McGrath*, reported in 341 U.S. 123, he said, "You weigh the hurt against the good that's to be done." In other cases, I've cited another case . . .

THE COURT: I didn't understand what you said.

MR. FOX: Mr. Justice Frankfurter in that case said in determining what amounted to due process was a weighing of the good . . . of the hurt against the good to be done.

That's not the whole excerpt that I have in my brief, but I think that summarizes it pretty well. Well, in these circumstances, or in the *Stovall* case, the good to be done in that case was that here was the victim, the only person that could identify the defendant—she was not expected to live—I don't know what her condition of mind was at that particular time, but it seemingly might not have been, or it's a possibility, I'll say that, it was not as good as if

she had not been expected, or if she had been expected to live. But under those circumstances the suspect or the accused was carried to the hospital, by himself, and the Court, this Court, held in that case that because of the circumstances it was imperative that the identification be made under those circumstances and it was not
[16] . . . didn't amount to a denial of due process. In this case the circumstances were different, but I think in line with the same rule of law. Mrs. Beamer had, over the time, and I don't know how often it occurred or how regular, but she had identified, as stated by opposing counsel, she had looked at, she had looked at thirty or forty photographs. None of them were the defendant, she said. And I have an explanation for that; that is, he didn't have . . . he had no police record, the police had no photographs of him. She looked at several people during that time. It doesn't say how often or how regular, but during the, from January 22 to August 17 she looked at several people. None of them were the man that she . . . the man that attacked her, or she didn't identify any as the man who attacked her. I think the reason for that is that this was the first time he had been taken into custody by the police. That I think that shows the reliability of her testimony. But the point that I was going to make—over this period of time, I think, the police had decided, whether rightly or wrongly, is impossibility to have a lineup and counsel appointed for every person that Mrs. Beamer might—that might be a suspect. I think they, I believe from one inference that could be drawn from the record is that they really had given up on finding the person who raped Mrs. Beamer. And since that is the case and since this investigation was continuing over a long period of time, I think the totality of the circumstances made it impossible and seems to me like, not warranted in going through all the procedure that

you'd go through in identifying a hot prospect immediately after the incident occurred. I think that it becomes obvious—to the police by this time that Mrs. Beamer, if she was emotionally upset, and I suggest in my brief that she was, I don't know that there's anything that indicates that she was upset, she was frightened part of the time, but over a period of seven months, she had looked at several pictures. She had seen several . . . she had looked at thirty or forty pictures, she had seen several
[17] people. It became obvious that she wasn't quick to identify people who were not guilty. She said that she, of the photographs, she saw one photograph of the person . . . had features like the defendant. So it appears that she was being very . . .

THE COURT: Excuse me, like the assailant?

MR. FOX: Like the assailant, yes, sir.

THE COURT: But what puzzles me about this is she was never able to say anything about the features of any assailant.

MR. FOX: Yes, sir, well, I think that the record indicates that she did.

THE COURT: That she did?

MR. FOX: That she did say something about it, and I'm not disputing what the printed record said as stated by my opposing counsel, but I think from the inferences we can say that she did say something about him. The police, one of them, testified that she did give a description. Nothing was asked about what she said in that description. But she said, as pointed out by Mr. Justice Stewart a while ago, that his hair was longer at the time she was assaulted, than it was at the identification or during the trial.

THE COURT: That's clear in the record?

MR. FOX: Yes, sir, that's . . . I think no question about it. That that's clear in the record. That is saying her identification prior to the lineup, her identification given at the trial prior to the lineup, she's saying, "He looks like he does now except his hair was shorter I believe it was at the time the incident occurred." She also said this, she said that his shirt was open and when he got on top of me, I could see that he had . . . I could tell or he had a big flabby breast and that he had a fat abdomen.

Now, nobody disputed that. This was seven months [18] prior to the time of the trial. If the defendant didn't meet that description at that time, he had been given notice. She had testified to that. It was up to him to refute that kind of evidence, so I think she did give considerable evidence about what he looked like at the time of the trial. She also said his voice, that she had some teenage boys and that his voice sounded considerably like those voices. Now here's a point I want to make. After she saw the defendant, and I say in my brief that the circumstances were limited, they're always limited to some extent in this sort of an incident. She said she never seen him before the attack. She didn't see him between the time of the attack and the arrest until she got down at police headquarters. But she said that there was light on in the hall, and he threw her down in the hallway of her home, I believe. She said that she looked up into his face, that she saw him, she saw him in the home too. It's not clear just how much she saw him. It looks like the daughter might have had as good an opportunity to see him as Mrs. Beamer. The daughter said she couldn't identify him, but I want to say, the daughter did relate some circumstances about his appearance that corroborated what

her mother had said about him. But after she saw him at the police headquarters, and incidentally, one of the policemen said there were five policemen present. The defendant said, in the room where he was identified, there were two policemen, Mrs. Beamer and another woman. Now, that's, I think an important point. It's argued that with five policemen present that that of itself suggested that maybe Mrs. Beamer didn't feel free to speak up. Well, I think what the policeman is saying there are five policemen around headquarters, but the defendant's testimony is they were two policemen in the room where the identification took place, Mrs. Beamer, and another woman.

THE COURT: Yes, but how many testified as to her identification at the trial?

MR. FOX: How many?

[19] THE COURT: Policemen?

MR. FOX: The Court please, I can't answer it. There was one police officer that really testified to it, and I think maybe that might have been . . .

THE COURT: Is that all?

MR. FOX: As far as I remember, she . . .

THE COURT: I thought we were told that four police officers testified to what happened at the identification?

MR. FOX: If the Court please, I really don't know. I can't—that was a question I didn't anticipate.

THE COURT: Isn't that in the record? I suppose we have the full trial record?

MR. FOX: Yes, Sir, we got the full trial record and I . . .

THE COURT: Well, that's all right.

MR. FOX: I think I can find out. One policeman testified very—I think at length about what took place. Now there were some others that maybe had something to say, but I'm just . . . there's an Officer Cathey that really related the circumstances that took place. The others, didn't, if they testified, and I think they did, I think I'm mistaken, it wasn't as fully as Officer Cathey testified. Now after she saw the defendant she still didn't say this is him. She said, "Let's hear him talk." And after he said these words that the assailant said to her, she said, "This is the man." Now one of the reasons I think back of *Wade* and *Gilbert*, is that in the type of lineup that's talked about there, the defendant doesn't . . . he's in a circumstance or so situated that he can't tell what goes on. He doesn't know what the police do and what the suggestive gestures are made or what's said or anything of the sort. That wasn't true in this case. This defendant was in the room. He could see who was taking part in his identification, and what was done. What I'm
[20] saying is that under these circumstances it is possible to reconstruct what took place because the defendant was there present and saw it. He could have informed his counsel as to what took place and counsel wouldn't have had to cross-examine in the dark as suggested in some of the other . . . in *Gilbert* or *Wade*. I've forgotten, maybe it's suggested in both of them. That is not the way . . .

THE COURT: You think this procedure was preferable to a lineup then? You think . . .

MR. FOX: No, Sir, I . . .

THE COURT: That a sixteen-year-old boy was given an advantage by being taken alone to the doorway of this room and then he could, with the wisdom that we all know is characteristic of sixteen-year-old boys—that wisdom and self-possession—observe what was going on and later give his counsel an account of it?

MR. FOX: No, Sir. I think it would have been more protective if he had been placed in a lineup with counsel present . . .

THE COURT: Why didn't they put him in a lineup?

MR. FOX: Sir?

THE COURT: Is there any reason in the record here why they didn't put him in a lineup?

MR. FOX: No, Sir. I don't think so, but I think the inference is that she had been down to the . . . Mrs. Beamer had been down to the police quarters so many times. She had looked at so many people, I think the police, by that time, surely decided that she was going to be cautious and she was not going to identify anybody until the real person comes along. And I think it would have involved too many lineups and too much red tape, if the Court please, to have kept on doing this every time.

[21] THE COURT: Does this record show that she was confronted by anybody else, any other suspect?

MR. FOX: This record shows that she was asked to identify several different people as . . .

THE COURT: Does it show that she was confronted by several different people, or shown, or does it . . . or may it not be that she was shown their pictures?

MR. FOX: Court please, I'm not sure I understand you. She was shown thirty or forty different pictures to identify . . .

THE COURT: I know, and I'm asking you whether she was shown other living people other than . . .

MR. FOX: Yes, Sir, yes, Sir . . .

THE COURT: . . . this sixteen-year-old boy?

MR. FOX: The record says several. The record says several. It doesn't say how many or at what periods of time or the regularity or anything of the sort. I think that perhaps the inference to be drawn from the record is that everytime the police found somebody that had raped somebody else they'd call Mrs. Beamer down there to see, "Well, is this the one that raped you?" and she . . .

THE COURT: Well isn't the lineup customarily used in Nashville?

MR. FOX: I would think so, if the Court please, but I don't know. The record doesn't indicate whether it is or not. I would think so. I think the reason for it

in this case, as I said before, that the inference to be drawn from the record was that this was happening so often and no result, that it just got to be a matter of routine and maybe the officers did get a little careless about it, but I think . . .

THE COURT: Mr. Fox, in this connection I see on page, maybe you can help me on it, on pages 24 & 25 of the record, this is on cross-examination of Mrs. Beamer, the attorney says, "And that was the second time you
[22] were allowed to see him?" She says, "That is correct." And then a little later she says, "That was not the first time I had been down to look at 'the' suspect."

MR. FOX: Yes, Sir. I don't think she meant by that this particular suspect. I think that was not the first time that she had been down there.

THE COURT: Well, I know, but this one is a . . . I can't find any antecedents to this at all.

MR. FOX: Yes, Sir, well . . .

THE COURT: And that was the second time you were allowed to see "him".

MR. FOX: Well, the record shows this was the first time he had been to police headquarters.

THE COURT: And this was the first time she had ever . . .

MR. FOX: This was the first time she . . .

THE COURT: This was the first time she had been asked . . .

MR. FOX: Yes, Sir, yes, Sir, and I think the testimony is a little confusing. Maybe she didn't understand the question. There was a good bit . . . This was a pretty heatedly tried lawsuit and there was right smart controversy in it and I don't think she understood it, but this was the first time he had been in the police headquarters. And I may have added that they didn't have his picture, but I just think the inference to be drawn is that if he hadn't been there, if they hadn't arrested him, he had no police record, they didn't have any pictures to show. And I think that tends to show that she was careful and that she had time to cool off. I know in Mr. Wall's treatise on eyewitness identification he says that the length of time is a matter to be considered, but in this case I think that that was favorable to the State's position because this lady had taken her time. She cooled off and had made [23] it evident that she wasn't desperate to identify anybody. She was waiting until the right man came along. Now her daughter's testimony . . . her daughter couldn't identify the assailant, but her daughter gave this same description of him. She says that he had long hair . . . that he was large . . . that he was a member of the Negro race, and one other identifying feature that her mother had given. I've forgotten exactly what it is. I've got the citation here, I believe, on page 83. She even said (I don't know that this is material), but the daughter even said that the defendant had on a short sleeved shirt. Well, her mother testified to that. That may not be material, but it certainly corroborates to some extent what her mother had to say about it. Now, as I said before, I know it would have been some protection if coun-

sel had been present, but the purpose of having counsel there is to help to reconstruct what happened. The argument is made that because this is a boy and he wouldn't know how to protect himself and things of that sort, I don't really think that enters into this question, because certainly under *Wade* and *Gilbert*, if there was ever any doubt about it, there's not now, a defendant can be made to testify, I mean, made to make a statement for the purpose of, of knowing how his voice sounds. So I don't know of anything that counsel could have done if he had been there except to reconstruct the circumstances and it's not shown that the defendant was handicapped in any way. He was a sixteen-year-old boy but I don't know that that means he couldn't have been as observant as any, as an adult. All he had to do . . . he was present and could recite what happened. So, we think that that is not really sufficient to say that it amounts to a denial of due process in this case because counsel wasn't present. The Court please, I believe that just about finishes my presentation.

THE COURT: Mr. Fox, may I ask if he was arrested for another rape, was he not?

[24] MR. FOX: Yes, sir.

THE COURT: Whatever happened to that case?

MR. FOX: The Court please, the record doesn't show, and there was some argument made at one time about whether or not he was gotten properly over from the Juvenile Court over to the Criminal Court, but that's not . . . no longer in the case so far as I understand . . .

THE COURT: Is he charged now with that other rape?

MR. FOX: I think, Your Honor, please, I know from reading, or at least I read in the newspaper that there was other charges of this type pending against him. I don't know that, but I think I read that in the paper, and I think that's the circumstance.

THE COURT: Do you know whether they were dismissed or not?

MR. FOX: No, Sir, no, Sir.

THE COURT: Are the charges still pending?

MR. FOX: I do not know. I don't have any knowledge of any of the other circumstances or how many other cases were charged against him other than the one for that particular rape.

THE COURT: Is there anything in this record about that case at all?

MR. FOX: Not very much. It's a little came . . .

THE COURT: What is it?

MR. FOX: All right. The only thing . . . the trial judge was trying desperately to keep out any information about the other rapes. On cross-examination, Mrs. . . . one of the officers, this Officer Cathey, was asked, "Well, when did you first see the defendant?" He said over at a particular place and, of course, that was evident that it was where he was arrested in the other case. And
[25] that, as far as I know, that's about as much as ever got into it. It's argued by opposing counsel that

this is enough to indicate to the jury there was another case pending against him. And they make that argument some and that contention some during cross-examination. But that's about the extent of it.

THE COURT: Well, that would probably have some effect on the jury, wouldn't it, if they . . .

MR. FOX: Yes, Sir, if it got into the record . . .

THE COURT: . . . if he was arrested for another rape before he was arrested here?

MR. FOX: Yes, Sir, but this was the defendant's counsel bringing that out. This wasn't the State. Defendant's counsel was asking these questions to bring that evidence out. The trial judge was trying his best to keep it out and the district attorney, the prosecuting attorney, made the statement, and it's in the record, that he had cautioned the witness, I don't know whether this must not have been before the jury, but he had cautioned the witness not to mention the other offenses so the State . . . The prosecution and the court had made some effort to keep this out about the other offenses.

THE COURT: But, Sir, you have no information as to whether that was a provable case or whether it is still considered a live case by the State or not?

MR. FOX: No, no, no, Sir, I don't. It can't be determined by this record.

THE COURT: Is it a charge on his record now?

MR. FOX: No, Sir, you can't tell by this record that it's still a charge, whether it's still a charge against him or not. And I don't know, I really don't know, if the Court please. Opposing counsel may have some information about that.

[26] THE COURT: Was there any evidence to this case at all other than the identification of Mrs. Beamer?

MR. FOX: No, Sir, I don't believe so. I think it depends upon her identification. Now, let me say this, on his examination he testified and his mother testified to some circumstances that I think—I don't know what the inference to be drawn from it would be, but I certainly think it hurt him before the jury because he was a sixteen-year-old boy and his mother said that when she went anywhere she called back, at one place I believe she said about every hour to see if he was still at home. He testified to those circumstances. He didn't go anywhere. He never got away from home. And then it develops, and this came from one of the defense witnesses, that when his mother was away she had somebody watching him to see that he did stay at home, and I think that certainly hurt him before the jury and I don't know what inference could be drawn from it except that he was a peculiar sort of a child, that he was the sort of person that his mother had somebody watching . . . I think for fear . . . certainly she wouldn't have been afraid that a sixteen-year-old boy would do something to hurt himself. It seems to me like the jury could properly infer, they got the idea it was to keep him from getting into trouble somewhere. And he was a most peculiar and lone type boy. That's part of the defense proof, not our proof,

and I don't know that it's material before this Court, but it certainly made a difference with the jury, I would say.

THE COURT: Mr. Meltsner.

MR. MELTSNER: Just a few points, may it please the Court. First, I must object to the characterization of him as a "peculiar boy" by these defense witnesses. On the contrary they testified to his good character, reliability, and reputation, and I believe what they said was that he was very concerned about his mother. He and his
[27] mother seemed to look after each other, and this was a broken home. The step-father had left and was living somewhere else. I don't believe the testimony was that she had people looking after him unusually. There were just neighbors who lived in the vicinity. Now in answer to Justice White's question earlier, four police officers did testify to the identification. Four of the five that were present and the fifth, I believe, was sick, and that's the only reason he didn't testify.

THE COURT: Well, what . . . is your constitutional point that this is a due process question, that it really is amounting to saying that this is . . . that there just isn't any evidence to support this verdict?

MR. MELTSNER: That is one way I think it could be looked at.

THE COURT: Well, how else do you look at it? If this evidence was worth a jury considering, why I suppose you wouldn't have much of a case. You're just saying, it was so unreliable as to be inadmissible?

MR. MELTSNER: That's correct.

THE COURT: Or at least so unreliable it can't support a conviction.

MR. MELTSNER: Correct.

THE COURT: *Thompson* against *Louisville* case.

MR. MELTSNER: I think that's one way of looking at it, but I think you can also see it through cases like, well, first of all, *Stovall*, is the primary value, but also cases like *Turner v. Louisiana*, and all the cases like *Napue*. There's not a very big difference between leading one to testify falsely and leading one to testify on the basis of a mistaken identification. And this is . . . the identification was the trial of this case. The trial was an
[28] appeal from the identification. And when the police officers came in and kept harping on it, the authority of the police officers must have made it far more difficult for the jurors to accurately appraise the identification. Now, I just . . .

THE COURT: What did all these five officers, or as many of them as testified, testify to, to this identification that Mrs. . . .?

MR. MELTSNER: "Were you present in the police station. Did Mrs. Beamer identify this young man?" "Yes, she did," et cetera.

THE COURT: They used all of them, all of them to corroborate . . .?

MR. MELTSNER: Correct. And objection was made that this was not evidentiary, it

was just harping, and those objections were overruled. To the extent the State seems to use the gap between the crime and the identification to explain away the show-up procedure, I think it clearly must be the State's burden to show factors, circumstances which occurred during that period to enhance reliability. This record is just not enlightening on that point. The State never, never carried that burden. And clearly the petitioner can't carry that burden because he doesn't know what the police has done during that period. And it would be, it seems to me, that the State's primary defense, as raised here . . . it may be good in certain other cases . . . but it's not good on this record because the record just doesn't establish the circumstances of these earlier identifications. There may have been lineups held. Photographs may have been shown in July. They may have been shown in February. One doesn't know and it's the State's burden to explain it away.

THE COURT: To what extent was the original arrest for rape made mention in this case? I don't mean his arrest. I mean the arrest for another rape.

[29] MR. MELTSNER: This is all outside of the record. My understanding is that he was not arrested for rape, he was arrested on a loitering charge. And he was held on this loitering charge while the police showed him to various people, including the woman who was assaulted, not raped, assaulted on the 16th of August.

THE COURT: Was there some article in the newspaper, you say, about that?

MR. MELTSNER: Yes, yes . . .

THE COURT: And that was prior to his trial?

MR. MELTSNER: That is how another case was injected by the State before the jury. The newspaper stories which I have referred to describe the arrest. They say he confessed to certain things. They say that he was identified by certain women. The State began its presentation to the jury by asking Mrs. Beamer if she had identified him before or after these newspaper stories had appeared, and many of the jurors had read these stories.

THE COURT: They said so? On the voir dire?

MR. MELTSNER: That is correct. It took three or four days to select a jury in this case, for that reason.

THE COURT: You don't mean the jurors, now, you mean the venire . . . members of the . . .

MR. MELTSNER: Members of the sitting panel had, according to a statement of counsel in the trial court, jurors who had been accepted for the trial, had known about these stories. And there is . . .

THE COURT: Served as members of the jury?

MR. MELTSNER: That's the inference from that statement, yes. Yes. Despite the fact they had seen these stories.

THE COURT: Where is that in the record? . . . Well, I, we can find it.

[30] MR. MELTSNER: It's, it's, I'm sorry, Your Honor, it is a point made by counsel when he's objecting to this other case being mentioned.

THE COURT: Do you raise any such point in your petition for certiorari?

MR. MELTSNER: Concerning?

THE COURT: Questions presented?

MR. MELTSNER: Not exclusively, we raise the . . .

THE COURT: Did you raise it at all? I've just read it and I don't find it.

MR. MELTSNER: I believe in the petition we, we mentioned the . . .

THE COURT: . . . question presented?

MR. MELTSNER: No. Not the newspaper itself. It's just another factor in the case.

THE COURT: Do you know what's become of that other charge, that original charge?

MR. MELTSNER: My un . . . my best understanding is this . . . he has never been indicted for the assault that took place on August 16, but he has been indicted for two other charges in Davidson County, and these charges have not come to trial. But the original one, he has not been indicted on.

THE COURT: Those are rape charges?

MR. MELTSNER: Yes.

THE COURT: Very well.

CERTIFICATE OF ACCURACY

I, a member of the Supreme Court Bar, certify that I have compared this transcript with the sound recording and it has been accurately transcribed.

BART C. DURHAM, III

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	5
1. History of the Litigation	5
2. The State's Case Against Biggers	7
A. The crime	7
B. The arrest	11
C. The identification	12
D. The trial	15
E. The federal habeas corpus evidentiary hearing	18
SUMMARY OF ARGUMENT	24
1. The 4-4 Affirmance	24
2. The Stationhouse Identification	25
ARGUMENT—	
1. Biggers' previous conviction, affirmed by this Court by an equally divided vote, barred further review of the stationhouse identification in a federal habeas corpus hearing.	25
A. The statute	25
B. Case law	29
2. The stationhouse identification of Biggers was held fairly and scrupulously and not in derogation of his constitutional rights.	31
CONCLUSION	39

APPENDICES:

Appendix A - *U. S. ex rel Radish v. Crim. Ct. of City of N.Y.* (2nd Cir. 1972) (Mulligan, J. Dissenting) 1a

Appendix B -note, 40 Cinc. L. Rev. 833 (1971) 9a

CITATIONS

Cases:

Anderson v. Johnson, Warden, 390 U.S. 456 (1968) 29,30

Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971) 2

Biggers v. Tennessee, 219 Tenn. 553, 411 S.W.2d 696 (1967) 1,5

Biggers v. Tennessee, 390 U.S. 404 (1968) 1,22,23

Coleman v. Alabama, 399 U.S. 1 (1970) 25,33

Duncan v. Tennessee, 405 U.S. 127 (1972) 28

Durant v. Essex Co., 74 U.S. 107 (1868) 29,30

Etting v. United States Bank, 24 U.S. 57 (1826) 29,30

Hertz v. Woodman 218 U.S. 205 (1910) 31

Inman v. Baltimore and O. R.R., 361 U.S. 138 (1959) 31

Kirby v. Illinois, 406 U.S. ___ (1972) 38

Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966) 38

Radich v. New York,
401 U.S. 531 (1971) 27

Ross v. Radich,
O.T. 1971 No. 71-1510 27

Stovall v. Denno,
388 U.S. 293 (1967) 25,33

United States ex rel Radich v. Criminal Court of New York,
___ F. Supp. ___ (S.D.N.Y. 1971),
rev'd ___ F.2d ___ (2nd Cir. 1972) 27

United States v. Pink,
315 U.S. 203 (1942) 31

United States v. Worrall,
2 U.S. (2 Dall.) 384 (1798) 31

Wade v. United States,
358 F.2d 557 (5th Cir. 1966) 33

Washington Bridge Co. v. Stewart,
44 U.S. (3 How.) 413 (1845) 31

CONSTITUTION, STATUTES AND RULES

Constitution of the United States:
Fifth Amendment 2
Fourteenth Amendment 2

Statutes:

28 United States Code § 2241 (1966) 2
28 United States Code § 2244 (1966) 3,7
28 United States Code § 2403 (1948) 3,7

Rules of the United States Supreme Court:

Rule 23 4
Rule 33 4

Miscellaneous:

Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?* 40 Calif. L. Rev. 335 (1952) 28

Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 29

Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50 (1956) 28

Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827 (1957)... 28

Senate Report No. 1797, 89th Congress, 2nd Session, 1966 Code Cong. & Ad. News 3663 27

note, 40 U. Cin. L. Rev. 819 (1971) 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-586

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Petitioner

v.

ARCHIE NATHANIEL BIGGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

Mr. Biggers' rape conviction was affirmed by the Tennessee Supreme Court. *Biggers v. Tennessee*, 411 S.W. 2d 696 (1967) (Pet. Cert. App. I). This Court granted certiorari, 388 U.S. 909 (1967) (Pet. Cert. App. H); affirmed the judgment below by an equally divided vote, *Biggers v. Tennessee*, 390 U.S. 404 (1968) (Pet. Cert. App. G); and denied a petition to rehear; 390 U.S. 1037 (1968) (Pet. Cert. App. F). The United States District

Court for the Middle District of Tennessee granted a petition for the writ of habeas corpus in unreported orders (A. 32, A. 45) and the Sixth Circuit affirmed, *Biggers v. Neil*, 448 F.2d 91 (6th Cir. 1971) (Pet. Cert. App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered August 18, 1971. The petition for certiorari was timely filed October 27, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts

and any circuit judge within their respective jurisdictions . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

§ 2244. Finality of Determination

"(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

Title 28, United States Code, further provides:

§ 2403. Intervention by United States; constitutional question

"In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall

permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

The 1954 rules of this Court were in effect at the time the original writ of certiorari was granted, June 12, 1967. Rule 23, The Petition for Certiorari, remained unchanged in pertinent part by the 1967 amended rules, and was as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 33

"(2) (b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U.S.C., § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C., § 451, such initial pleading, motion or paper shall state whether

or not any such court has, pursuant to 28 U.S.C., § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question."

QUESTIONS PRESENTED

I. WHETHER AN AFFIRMANCE BY THE SUPREME COURT IN AN EQUALLY DIVIDED OPINION AFFIRMING A STATE CONVICTION ACTS AS RES JUDICATA AS TO THE SAME ISSUES RAISED IN A SUBSEQUENT PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL COURT.

II. WHETHER RESPONDENT WAS DENIED A FAIR TRIAL AS A RESULT OF THE USE OF IDENTIFICATION EVIDENCE ALLEGEDLY THE BY-PRODUCT OF AN UNCONSTITUTIONAL PROCEDURE.

STATEMENT OF THE CASE

1. *History of the Litigation*

Respondent Biggers was identified by Mrs. Margaret Beamer of Nashville as the man who raped her January 22, 1965. The identification was made at the Nashville police station on August 17, 1965, and Biggers was charged with rape.

Biggers was convicted after a trial by jury held November 29–December 3, 1965. His conviction was affirmed by the Tennessee Supreme Court in *Biggers v. Tennessee*, 219 Tenn. 553, 411 S.W.2d 696 (1967) (Pet. Cert. A-68).

This Court granted certiorari, 388 U.S. 909 (1967) (Pet. Cert. A-67) and affirmed by an equally divided Court 4-4 (Douglas, J., dissenting) (Marshall, J., not participating),

390 U.S. 404 (1968) (Pet. Cert. A-61). A petition to rehear was denied, 390 U.S. 1037 (Pet. Cert. A-60).

The question upon which certiorari had been granted in the 1967 Term case as stated in that earlier Application for Certiorari was:

> "The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months [the exact time was actually six months, twenty-six days] earlier for voice identification by the prosecutrix."
>
> "Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a lineup, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights?" (Pet. Cert. A-8)

The briefs and transcript of record filed in that earlier case may be found in Volume 51, Transcripts of Records and File Copies of Briefs, Nos. 232-237, Supreme Court of the United States, October Term 1967. A transcript of the oral argument was submitted as Appendix J to the present Petition for Certiorari. The documents needed for consideration of the case are the Transcripts of Record and Briefs from the earlier case, No. 237, O.T. 1967[1] (one copy in Supreme Court Library and one copy of Transcript of Record an exhibit filed in this proceeding; cited as R. ___), Petition for Certiorari (containing earlier opinions and the Sixth Circuit opinion), the transcript of oral argument and the Joint Appendix (cited as A. ___).

[1] Petitioner's motion to use the original record in Biggers v. Tennessee, No. 237, O.T. 1967, was granted, 405 U.S. 954 (1972).

After rehearing was denied in April, 1968, a petition for writ of habeas corpus was filed in July, 1968, in the United States District Court for the Middle District of Tennessee, Nashville Division (A. 6) alleging that the identification procedures violated the Due Process Clause of the Fourteenth Amendment.

The District Judge, Hon. William E. Miller,[2] denied a motion to dismiss (A. 17), saying this Court "did not settle the merits of this case, and affirmed only through an equal split in opinion." (A. 19).

Affidavits were submitted by Petitioner (A. 24-A. 30), and a limited evidentiary hearing was ordered. (A. 31). After the Court heard testimony, it ordered a new trial without the stationhouse identification. (A. 32). A motion to reconsider based on the earlier adjudication by this Court was overruled. (A. 45).

The Sixth Circuit affirmed in an opinion by Judge Edwards with the concurrence of Judge McRee, with Judge Brooks dissenting. (Pet. Cert. A-1). This Court granted certiorari, 405 U.S. 954 (Feb. 28, 1972). The Solicitor General has not indicated whether he wishes to ask the Court for permission to intervene pursuant to 28 U.S.C. § 2403 to defend the constitutionaltiy of 28 U.S.C. § 2244(c).

2. *The State's Case Against Biggers*[3]

A. The Crime

Mrs. Margaret Beamer, 39, the mother of five children, returned to her Nashville home Friday afternoon, January 22, 1965, from her job as an LPN at Hubbard Hospital, where she had worked fifteen years.

---

[2] Judge Miller is a member of the United States Court of Appeals for the Sixth Circuit.

[3] The Account which follows is stated as favorable to the theory of the State as is supported by the record.

Her husband, a law student attending night classes on Mondays and Fridays (R. 27), left the house to get some law books about 9:00 p.m., leaving her alone in the house with her 12 year old daughter and 6 year old son.

The rapist, who apparently had been looking down into the house from the railroad tracks outside, entered the house. (R. 14). There is a hallway near the confluence of two bedrooms, a living room, and the kitchen. (R. 9, 12, 13, 21, 22, 33, 34, 83, 87-93). Although the hallway itself was unlighted (R. 12), there was "light in the living room, light in the bedroom and light in [Mrs. Beamer's] bedroom." (R. 12). The lighting in her house was "ordinary" and "well-lighted." (R. 14).

The intruder stepped out of the dark kitchen, grabbed Mrs. Beamer in the hallway and grappled her to the floor. (R. 9). Her screams brought her twelve year old daughter, Francesca into the hallway; but the rapist, brandishing a large shiny knife, ordered Mrs. Beamer to tell her daughter to go back into her bedroom, which the daughter did.[4]

---

[4] The defense has discounted the daughter's testimony, but this 12 year old (age 13 at trial), although unable to identify Biggers, said "he was tall, and he was kind of big and dark" (R. 83), "Negro," (R. 83), and "had on a short-sleeved shirt." (R. 83) The rapist's voice made a particular impression on her. She described it as "a young voice" (R. 84) and distinguished it from the voice of the defense attorney, whom she said she supposed had "an old voice." (R. 97) She noted the rapist had a silver knife, did not have on a hat, and thought his short-sleeved shirt closed at the neck (R. 91).

Her testimony weakens the contention, at least as to this witness, that State authorities sought to overreach the defendant with an impermissibly suggestive identification practice.

The daughter noted this about the assailant: 1) tall, 2) big, 3) dark, 4) Negro, 5) wore short-sleeved shirt closed at the neck, 6) had no hat, and 7) had young voice. The inference is the voice did not fit for the size of the man. This was a matter for the jury. Even defense witnesses noted what a large person he was to be so young. Biggers testified he was 5'9" to 6' and weighed 187-200 pounds (R. 112). His stepfather, a defense witness, said Biggers "never did go anywhere" because "he said he was overlarge for his age." (R. 127) A picture of the defendant (never introduced into evidence, although made an exhibit) is in the record at page 197.

During the scuffle on the floor of the hallway, Mrs. Beamer was "looking up in his face." (R. 14)[5]. She said there was no light in the kitchen (R. 33) and was asked, "So you couldn't have seen him then? Answer: "Yes, I could see him, when I looked up in his face." Question: "In the dark?" Answer: "He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was." (R. 33).

Mrs. Beamer and her assailant left the "well-lighted" house[6] (R. 14) through the dark kitchen and went out-

[5] At this point the District Attorney asked if she were "able to describe this man, other than seeing a butcher knife." She answered, "No, other than I remember the blade being shiny." (R. 14) Here again, the State argues the witness was taking pains not to overreach the defendant and was testifying without malice or vindictiveness.

The tone and timbre of the witnesses, their vindictiveness or lack thereof, and the confusion as to whether Mrs. Beamer made an in-court identification come through cold on the printed record. Appellate lawyers and judges can never get the feel of the case which the jury gets, which is all the more reason why jury verdicts should be overturned cautiously.

On cross-examination, the defense attorney asked the victim, "You could see? No light? And you could see him and know him then?" and Mrs. Beamer answered, "Yes." (R. 34).

[6] The 12 year old daughter said there was an opening from the living room into the hall. The lamp "was next to the chair that was next to the door that leads outside." (R. 89) The defense attorney then asked: In which corner—northwest or northeast? The witness said northwest. Apparently this was illustrated to the jury (Defense Atty: "In this corner over here... or in this corner over here...?" R. 89), but reading the cold record, one can't tell whether the lamp was by the chair next to the hall where Mrs. Beamer was thrown to the floor or whether the lamp was somewhere else. (R. 89) "Northwest corner" (R. 89) means nothing. It makes a big difference, however, because it corroborates her answer of "Yes" to the question on cross-examination: "You could see? No light? You could see him and know him?" (R. 34).

doors. She testified, "There was a moonlight night, with a few clouds. And street lights on down on the street, not on the track. But it [the lights] did not extend up over the track. Taller than the track was." (R. 13). A full moon was shining brightly. (R. 34) Neon street lights, called Ben West[7] lights, *hung over the tracks* (R. 13). illuminating the way as they walked along the tracks. One or two blocks away from Mrs. Beamer's house (R. 33), in a little wooded area off the tracks (R. 10), the defendant held a butcher knife over her, and standing over her with the knife lay down with her cheek to cheek having intercourse for 15 minutes. (R. 28). After penetrating her sexual organs and reaching a climax (R. 60), Biggers let her dress and go back up the railroad track. (R. 10, 11). Biggers "went off in the opposite direction, running." (R. 10).

Mrs. Beamer said that when Biggers raped her he had on "a short-sleeved green shirt. As to the type of trousers on, all I can remember, they were dark. I don't know what color."[8] (R. 29).

Returning home and finding her children safe, she called the police (R. 15) who carried her to the hospital. (R. 44). The physician who examined her testified at the trial she had had intercourse during the previous three hours. (R. 63)

During the following months the police showed her thirty to forty photographs both at home and the police station

---

[7] The name of a former Nashville mayor.

[8] A witness called by the defense to testify as to Biggers' good character, Miss Nina Carter, was a bookkeeper at Meharry Medical College, and acquainted with Mrs. Beamer and her work as an LPN. She testified Mrs. Beamer was of good character: "Well, I'll say I don't know anything wrong about her." (R. 144) There was no evidence introduced that her testimony should not be entitled to full faith and credit in a court of law.

(R. 15, 39) but only one even had features like the rapist. (R. 15). Then, six months and twenty-six days after her attack, the Nashville Police solved the case.

B. The Arrest

The trial testimony concerning the arrest and subsequent developments, such as Biggers being declared incorrigible by the Juvenile Court, make sense only when supplemented with the affidavits of Biggers, his mother, and his attorney filed at the federal habeas corpus hearing. (A. 24-30). When these are combined, the State's case is as follows:

Biggers, while receiving emergency treatment at Hubbard Hospital about 10:30 p.m. August 16, 1965, was questioned about a cut arm. (A. 26). The attempted rape of Mrs. Carrie D. Silverman, a resident of the Bordeaux area of Nashville, was also being investigated at this time. (A. 29). Biggers was taken to the home of Mrs. Silverman in Bordeaux (R. 51; A. 29) where, according to his affidavit (A. 29) "Mrs. Silverman attempted but could not identify [me]." However, Officer Cathey testified at the trial out of the presence of the jury, that on the case that "happened on Cliff Drive [the Silverman attempted rape] . . . we had a positive identification, you see." (R. 55). The next morning, August 17, the Juvenile Court declared Biggers incorrigible because of the Silverman attempted rape and bound him over for trial as an adult. (R. 52, 55; A. 28; Biggers' mother in her affidavit said she was told by the police that her son was "identified by a lady in Bordeaux on the charge of assault with intent to ravish and also by a Negro woman on a charge of rape and that he could not be released.")

Establishing the "positive identification" (R. 55) of Biggers in the Silverman assault took from 10:30 p.m. (A. 29) until midnight or shortly thereafter. Biggers was arrested about 1:30 a.m. (R. 51) and lodged overnight with the Juvenile Court night attendant for safekeeing. (A. 30).

On the morning of August 17, he was declared incorrigible (R. 52) and taken to the police station by officers Cathey and Hamm, working under the direction of Lt. McDaniel. (R. 52). Officers Smith and Berry brought Mrs. Beamer to headquarters. (R. 39). The stage was thus set for the confrontation between Mrs. Beamer and the defendant.

C. *The Identification*

The officers who picked Mrs. Beamer up at her home the morning of August 16, stated, "We had a suspect we would like her to look at and see if she could identify him." (R. 40). Defense counsel tried to maximize the suggestibility of the witness, but she stated, "I identified the suspect. They didn't point him out." [9]

The circumstances of the police station identification were as follows:

---

[9] Although no notice has been taken of this, Mrs. Beamer perhaps saw Biggers first at the Juvenile Court prior to the stationhouse identification. Biggers at one point testified: Q. "Where were you when you first saw Mrs. Beamer?" A. "At the Juvenile." Q. "At Juvenile Court? What day was that?" A. "Oh, I don't really know." (R. 107) At another place in the record, Mrs. Beamer on cross-examination mentioned she had testified at the juvenile court (R. 24). Then apparently speaking of the police station identification, although this is unclear, defense counsel asked: "And that was the second time you were allowed to see him?" (R. 24) Mrs. Beamer answered: "That is correct." (R. 25).

At the police station, Mrs. Beamer, with another woman whose identity the record does not reveal, waited to identify Biggers in a room off a long hallway. (R. 66, 73). Biggers' testimony was: "I was in a room all by myself with another detective, R. B. Owen, and Lt. —I think it was Sgt. Woods come in there and got me, and carried me to to the room where she [Mrs. Beamer] was. And there was another woman with her. And I was facing her, just like I am facing this speaker right here, and she looked at me, and then she told him to tell me to say, —uh— Stop, or I'll kill you. Something like that. And Woods told me to say it. And I hesitated for a minute, and then he said, Say it, Son, and I said it. And then she nodded her head like this." (R. 107-108).

Three policemen testified Mrs. Beamer identified the defendant. Detective Smith remembered she said, "That is the man" without ever hearing the defendant speak. (R. 40). Lt. McDaniel said she identified Biggers without any hesitation: "Mrs. Beamer was in the office directly across from mine, and we had the defendant come and stand—walk up the hall and then come and—come back and stand in front of the room, which, without any hesitation, she——". (R. 66). When asked what happened when the defendant was asked to talk, the officer said: "Right at that time when she iden-, saw him, she asked us to have him repeat a question which he repeated. That, and she also by voice, yes, sir." (R. 66). Lt. McDaniel was asked, "You brought her down to identify that one subject?" and he answered, "That's right. He walked by the door opening—her—where she was sitting the door was open, which another lady was sitting in the office also, ——." (R. 73).

The third police witness who testified concerning the identification[10] was Detective Bailey. He unequivocally said Mrs. Beamer identified Biggers, not by voice, but "by looking at him, and said he was the one." (R. 79). Detective Bailey answered, "Yes, sir," when asked, "Had she identified him before he was ever asked to talk?"

Mrs. Beamer was asked at trial, "What physical characteristics, if any, caused you to be able to identify him?" She replied, "First of all, —uh—his size, —next I could remember his voice." (R. 17)[11]. She testified generally and positively that she identified Biggers at the police station on August 17. (R. 16-19). The physical characteristics Mrs. Beamer testified to were Biggers' face: "No, when he placed his face against mine—that was another thing, his skin was rather smooth, as, you know, someone that didn't shave." (R. 18). [Biggers on cross-examination was asked by the District Attorney: "You haven't started shaving yet, have you?" A. "No, sir" (R. 112)]; his size: "Well, as I said, the size. He had—well at the time he raped me, his shirt was unfastened, and he had a large kind of flabby abdomen and breasts." "Kind of flabby big breasts. As I say, the abdomen was fat." (R. 19); his hair ("Sort of bushy" R. 18); and lastly, his voice.[12]

---

[10] Only two other policemen testified. Officer Black's testimony concerned events long before the Biggers arrest. (R. 103-106) Officer Cathey was asked, "Were you, yourself, present at any time when anyone attempted to make an identification of Mr. Biggers?" and answered, "Well, I was in and out of the room, General. I cannot say—as far as being there." (R. 48).

[11] All the witnesses (three policemen and Mrs. Beamer) said she first identified the defendant by his appearance and then later he was asked by Mrs. Beamer to speak the words of the rapist. Even Biggers' testimony is not to the contrary.

[12] She said it was a "medium-pitched voice of a young man not an old man, not mature." Q. "Was it loud, or soft?" A. "He talked soft." (R. 17). This is apparently an accurate description to the extent that such information can be gleaned from a printed record. The attorney for Biggers opened his examination of Biggers as follows: Q. "Now, talk so I can hear you." A. "Yes, sir." Q. "Now, you are talking o. k." (R. 104).

D. The Trial

The State brought the defendant to trial on November 29, 1965, following the arrest on August 17. He was represented by two retained attorneys. The trial began on Monday, November 29, and concluded Friday, December 3. The jury found the defendant guilty and recommended a sentence of twenty years which was imposed by the Court. In accordance with Tennessee law he was sentenced to the State Vocational Training School for Boys and upon reaching his majority was transferred to the Tennessee State Prison. (R. 187).

The State's proof was as heretofore detailed, except there was no mention made of the Silverman rape attempt.

The defendant testified and denied the crime, saying he could not remember his activities the night of January 22. Six witnesses testified to his good character. The defense sought by the testimony of the defendant's mother, stepfather, and acquaintances to establish that defendant was unlikely to have committed the crime because no one could get him to leave his home.

The defendant's witnesses sketched a portrait of a maladjusted child living as a recluse. His mother said, "He just stayed at home. I couldn't get him to leave home. ... I just couldn't get him to leave, no matter what we did. We tried, but I just couldn't get him out." (R. 117). His stepfather said Biggers "stayed at home of [sic] the time cause we couldn't get him to go anywhere." (R. 126). When asked why, he said, "Well, at first he said—uh—his breath smelled. He—uh—and he also said he was overlarge for his age." (R. 127). Mrs. Leftwich, a neighbor, testified:

"Well, the only thing that I can say is that when I go into the home, usually he would meet me at the door, or his mother would tell him to come to the door, and he always met me and spoke, and sometimes, after he would speak he would go to the back, and I would say, Nathaniel, what's happening? I'd say, What's happening why you are leaving the door, he said, Mrs. Daniel, —that's my career name is Daniel—he says that I'm so big, I'm ashamed of myself, and I said, But you're handsome. You're tall and handsome. A lot of men would desire to be the height and the size of you, that you are. And so, from then on, he always would talk to me." (R. 155).

Another defense witness, a neighbor, Mrs. McCain, gave this testimony:

"Well, I hadn't seen this child right then, but a few days later I began to see Nathaniel Biggers, and of course by him staying in the house all day like he did, I wondered about him, and I began to watch to see if he'd stay in when his mother would tell him to. Well, I never would see him come out doors for he looked at television all day long, and occasionally I would see him look out the window, all day. That went on for about a year, and we began to worry about him and wonder what was wrong with a boy that large staying in, because she left, she'd say, Keep the doors locked, but every time anybody knocked on the door over there, naturally we'd see it, because we was right on the front, my husband's bedroom and mine, right on the front. And we'd look out to see what was happening. He wouldn't come to the door but shortly after the person would leave, he would come to the door and look out." (R. 161-162).

Mrs. Alsup, a neighbor called as a defense witness, had this to say about the defendant:

"And they told me about this boy [Biggers]. Well I got concerned about him, and he worried me cause all he would do was stay at home, and come to the door and look out. If anyone come up, he wouldn't answer the door, then he'd wait till they would leave, and then he would come to the door. And answer the door. And I said, Well, why couldn't he come then? And it worried me—but he was always at home, and it worried me why did he stay at home so much, and not get out and carouse up and down the street like the rest of the boys. And I would lay there and fuss, and I worried and I worried and I worried about him, till it just made me sick, and the Doctor said, Well, you're just going to have to quit worrying about that boy. I said, How can I? I said, He's a boy, and it worries me. Because——

"Q Was he——

"A He didn't go anywhere night or day.

"Q Uh-huh? Uh-huh?

"A And it was enough to make you concerned about him.

"Q Did you discuss it with his mother?

"A No. I—I—I wasn't able to get out.

"Q Uh-huh?

"A But I said when I did get out, I said, I am sure going out somewhere. And why does she keep him housed up like that? All the time?" (R. 169-170).

The State established on cross-examination of the defendant's stepfather that the defendant's home was only two blocks away from White's Lunch Room. (R. 131, 132, 136) Mrs. Beamer, after being raped, called the police using the phone at White's Lunch Room. (R.

15, 23). She said: "I went to White [sic] Lunch Room, and it's about three or four doors down—in fact, it's two doors down from where I was—my house—." (R. 23).

A question claimed by some not to be fully answered in the trial transcript is whether Mrs. Beamer made an in-courtroom identification. The District Attorney asked her, "Are you telling this Jury today that you have any doubt about this? Or do you have any doubt about this?" Answer: "No, I don't have any doubt." (R. 17). Later the trial judge asked Mrs. Beamer, "Is there any doubt in your mind today?" After an objection was made by defense counsel, the judge asked her again: "All right. Is there any doubt in your mind today?" Mrs. Beamer said, "No, there's no doubt." (R. 19).

The State contended when this case was before this Court previously that Mrs. Beamer made an in-courtroom identification. Mr. Justice Douglas in his dissent disagreed, saying, "The inference to be drawn is that Mrs. Beamer had no current doubt as to the correctness of her previous identification of petitioner at the police station." 390 U.S. at 406 n. 2.

E. The Federal Habeas Corpus Evidentiary Hearing

After a petition for rehearing was denied April 22, 1968, 390 U.S. 1037, a petition for the federal writ of habeas corpus was filed July 1, 1968, alleging, *inter alia*, an improper stationhouse identification of Biggers. (A. 6-16).

The Court ordered a limited evidentiary hearing which amplified the available information a great deal.[13] One

[13] The order read: "(T)he Court desires open court testimony on the following matters: the nature of the 'show-up' identification process as opposed to the 'line-up' identification process, and why the former process was employed in the instant case; and, the general reliability of voice identifi-

(Continued on following page)

policeman's notes said that Mrs. Beamer described her assailant as 6' tall, 180 pounds, dark hair, with a medium to dark brown complexion.[14] (A. 74). Mrs. Beamer remembered that at the time of the rape she described her assailant in this manner:

1. Teenager
2. Age 16-18
3. 180-200 pounds
4. Dark brown complexion
5. Bushy hair but not like an Afro
6. Height 5'10" to 6'
7. Smooth face of someone who didn't shave much
8. Voice of a teenager before he reaches adulthood and the voice gets deep. (A. 124-125).

Between the assault on January 22 and the identification of Biggers on August 17 the police brought individuals and pictures to Mrs. Beamer's home for identification, and she attended several police station lineups containing four or five men dressed alike. (A. 81, 83, 124, 130).

On the evening of August 16, 1965, while Biggers was receiving care at Hubbard Hospital for a cut arm (affidavits A. 24-30; testimony A. 76), Mrs. Silverman, the

---

(Continued from preceding page)

cation procedures, and their relative importance compared with other methods of identification in linking the petitioner to the offense alleged in the instant action."

[14] Both the State's attorney and Biggers' attorney frustrated Judge Miller's efforts to elicit from the police witness what description she had given of her assailant. The State's attorney misunderstood what Judge Miller was asking the witness (A. 87) and then again interrupted an answer to advise the Court that Mrs. Beamer was to be a witness, which was irrelevant (A. 87). Biggers' attorney advised the Court that Mrs. Beamer did not testify about the assailant's dress (A. 87), here again getting off the subject. Actually Mrs. Beamer said the rapist wore a green shirt and dark trousers (R. 29).

victim of a rape attempt, was a patient at Baptist Hospital. (A. 76). Biggers, who had become a suspect, took the officers to the scene of the Silverman attempted rape and reenacted the crime.[15] He was held that night on this crime under a technical charge of "loitering."[16] (A. 81).

The next morning, August 17, two officers brought Mrs. Beamer to police headquarters to look at a suspect.[17] (A. 129). Biggers was in a room used by Dr. Core, and Mrs. Beamer was in an office down the hall later used by the sergeant of detective. (A. 78). Two black policemen in plain clothes

---

15 Biggers was charged but never tried on this attempted rape. In his affidavit, he denies everything. The prosecution for the Silverman attempted rape was dropped after Biggers' conviction and twenty year sentence in this case. It is important to remember that the trial jury heard only about the rape of Mrs. Beamer. The order granting the limited federal habeas hearing precluded the state from introducing any evidence about the Silverman assault. For the text of that order see n. 13 supra.

16 Formal charges of attempted rape (Mrs. Silverman) (A. 77) and rape (Mrs. Beamer) were subsequently placed before the Juvenile Court. (R. 52, 55) Biggers' counsel seems to imply the police acted improperly by charging him with "loitering." If it is necessary to detail a 16 year old until he can be presented to a Juvenile Judge the following day, it would seem better to hold him on a technical charge of "loitering" than on a charge of "attempted rape" which would be a blot on his record forever, even if unfounded.

17 Apparently there is a typographical error in the transcript. Mrs. Beamer said (A. 123): "I was told they had some suspects (sic), and if I recognized this suspect, just to look at him and see if I could recognize him . . ." Biggers' counsel apparently understood her to say "suspect" (singular) for on cross-examination he asked: "Now you said that the officers mentioned that they had a suspect that they wanted you to see."

This is the only difference, if indeed this be a difference, between Mrs. Beamer's trial testimony and habeas testimony that the State can find. Everything else, except as pertains to the Silverman rape, is uncontroverted (including the testimony of the police officers, discussed post).

The trial judge incorrectly said in his Order of April 17, 1970 (A. 34): "As to what transpired at the show-up, there is some conflict between the testimony given by Mrs. Beamer at the trial and that given by her at the evidentiary hearing held in this court on October 30, 1969.)

(Sgt. Woods and Officer Bailey) led Biggers past the door where Mrs. Beamer was seated with an unidentified woman and the policeman in charge, Captain McDaniel. (A. 79-80). Mrs. Beamer immediately recognized Biggers as her rapist without ever having heard him speak. (A. 80, 123, 124, 129, 134). After identifying him by his appearance, she asked the officers to have him repeat the words, "Shut up or I'll kill you" (A. 80, 123, 124, 129, 133), which made her even more certain in her identification. (A. 129). The foregoing proof given at the habeas corpus hearing was uncontroverted. Biggers testified at the trial concerning the confrontation, and his testimony is not contradictory. (R. 108).

Other uncontroverted evidence offered at the habeas corpus hearing was that Captain McDaniel attempted to arrange a lineup. On an average day there are 100 people in the Metro jail, an adult facility, and a maximum of 50 boys and girls at the juvenile jail. (A. 69). Captain McDaniel conferred with Judge Tatum of the Juvenile Court but was unable to find anyone of Biggers' stature. (A. 70). He telephoned his superior officer at the jail likewise without results. (A. 75). Captain McDaniel found the adults at the jail comparable in size with Biggers were too old, and the juveniles in the Juvenile Detention Center were too small. (A. 72).

Mrs. Beamer said she positively identified Biggers at the trial. (A. 122). She had no doubt in her mind at the time of the trial. (A. 123). When asked what she meant at the trial when she said she had no doubt, she said, "I had no doubt because I was sure that this is the one." (A. 127). She said, "He had the same face, this is the same man that attacked me, because he looks the same, the same face, the same build, the same color, the same hair, and the same age when I viewed him." (A. 128). On

cross-examination when asked if she had identified Biggers at the trial, she said, "I can't recall whether I pointed my finger, but I was asked if that was the man, and if that is him over there, and there was some way that I indicated that Mr. Biggers was the individual." (A. 131).

Dr. Irwin Pollock, a psychology professor at the University of Michigan with special expertise in auditory perception, testified as Biggers' expert witness. From his study of the record in this Court in 1968 in *Biggers v. Tennessee*, he found many factors he thought prejudicial, among them:

a) one to one confrontation (A. 92)

b) lapse of time (A. 92)

c) Defendant was identified as a suspect to Mrs. Beamer (A. 93)

d) Defendant was requested to utter a specific statement, "Shut up or I'll kill you," which had emotional connotations (A. 93)

e) Mrs. Beamer was surrounded by police officers perhaps intent "in finding for a particular suspect" (A. 93)

Dr. Pollock characterized the procedure used as a yes-no procedure which he called inferior to a "forced choice" procedure (A. 93) and noted that auditory memory is not as good as visual memory. (A. 96). Dr. Pollock admitted on cross-examination that he had assumed that Mrs. Beamer's prime mode of identification had been auditory. (A. 103).

Biggers' mother testified the police took her son away from the hospital the night of August 16 and kept him until she saw him at Juvenile Court at three or four o'clock the next morning. (A. 120). At about 8:00 a.m., she retained an attorney. (A. 121).

The District Judge took the case under advisement in November and the following April ordered a new trial "unaffected by Mrs. Beamer's stationhouse identification and the testimony of the police officers who were present when it took place," quoting the dissent of Mr. Justice Douglas, *Biggers v. Tennessee*, 390 U.S. 404, 409 (1968). (A. 32-43).

In another order entered a few weeks later, the Court overruled the State's contention that the 4-4 affirmance by this Court was res judicata. (A. 45-51).

SUMMARY OF ARGUMENT

1. The 4-4 Affirmance

This Court in 1968 gave plenary consideration to the stationhouse identification. The affirmance, even though by a divided Court, is res judicata as between the parties as to the same issue affirmed by the Court.

The consideration this Court gave in 1968 to the stationhouse identification is a factual question. The briefs and the transcript of oral argument show that all aspects of the identification were fully considered. The certiorari grant did not limit the question to voice identification, particularly in view of Rule 23 of this Court which says that a statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

In 1966 Congress enacted 28 U.S.C. § 2244(c). The statute provides:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The statute bars any relief for Biggers through federal habeas corpus as to the stationhouse identification.

2. The Stationhouse Identification

The District Court made erroneous findings of fact in reading the 1965 trial transcript. These findings are plain error and do not support an order granting a new trial excluding the stationhouse identification. Both lower courts' assays of the facts are demonstrably inaccurate in several critical areas. The State's evidence at the federal habeas corpus hearing, though uncontradicted, was disregarded and was even said to conflict with the 1965 trial record when a reading of the two shows they are complimentary, not conflicting.

The identification below was less suggestive than the ones approved in *Coleman v. Alabama*, 399 U.S. 1 (1970) and *Stovall v. Denno*, 388 U.S. 293 (1967).

ARGUMENT

1. Biggers' previous conviction, affirmed by this Court by an equally divided vote, barred further review of the stationhouse identification in a federal habeas corpus hearing.

A. The Statute.

Title 28, U.S.C. §2244(c) (Supp. IV, 1969), *amending* 28 U.S.C. §2244 (1964) provides:

"(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted

denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The Senate Report on this amendment says:

"The new subsection (c) provides that when a habeas corpus proceeding is brought in behalf of a person in custody under a judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari brought by the prisoner will be conclusive as to all issues of fact and law concerning an alleged denial of a Federal right that were actually adjudicated by the Supreme Court. There is an exception to the conclusiveness of this presumption if the applicant for the writ pleads and proves the existence of a materially controlling fact that did not appear in the record of the proceeding before the Supreme Court and that he, the applicant, could not have caused to appear in such a record by the exercise of reasonable diligence. This subsection is intended to give a conclusive presumption only to actual adjudications of Federal rights, by the Supreme Court, and not to give such a presumption to mere denials of writs of certiorari.

"The purpose of these new subsections is to add to section 2244 of Title 28, United States Code, provisions for a qualified application of the doctrine of res judicata."

S. Rep. No. 1797, 89th Cong., 2d Sess., 1966 U.S. Code Cong. and Ad. News 3663, 3664.

The Habeas Corpus Committee, chaired by Senior Circuit Judge Orie L. Phillips of the Tenth Circuit, was composed of federal judges who considered these recommendations to be consistent with this Court's habeas corpus rulings. Judge Phillips referred to the measure in a letter to Senator Joseph D. Tydings, September 24, 1966, in S. Rep. No. 1797, 89th Cong., 2d Sess. 4 (1966), as "a qualified application of the doctrine of res judicata."

In a case involving a similar res judicata question, this Court affirmed a New York conviction for casting contempt on the American flag by an equally divided Court in *Radich v. New York*, 401 U.S. 531 (1971) (Mr. Justice Douglas not participating). The District Court for the Southern District of New York denied federal habeas corpus relief, relying on § 2244(c). *United States ex rel. Radich v. Criminal Court of New York*, ___ F. Supp. ___ (S.D.N.Y. No. 71-2738, decided December 3, 1971). The Second Circuit reversed in a 2-1 decision, ___ F.2d ___ (2nd Cir. No. 71-2185, decided April 26, 1972), *certiorari pending sub nom. Ross v. Radich* (O.T. 1971 No. 71-1510).

The dissent of Judge Mulligan of the Second Circuit is reprinted as Appendix A to this brief.

The failure of the Sixth Circuit to even mention § 2244(c) much less apply it in this case has been recently criticized. See note, 40 U. Cin. L. Rev. 189 (1971).[18]

In a situation analogous to this case, after granting certiorari, briefing and oral argument, this Court dis-

---

18 This Note which is also critical of the Sixth Circuit in **Biggers** for not following Supreme Court case law is reproduced as Appendix B to this brief.

missed the writ as improvidently granted in *Duncan v. Tennessee*, 405 U.S. 127 (1972) (3 Justices dissenting). It is clear from both the per curiam order and the dissenting opinion that this Court felt there was no violation of the constitutional guarantee against double jeopardy. However, the rule of *Biggers*, as affirmed by the Sixth Circuit, would allow a federal district court to examine de novo the double jeopardy issue just as if this Court had not given it the fullest consideration when the case was initially before the Court. Biggers never alleged any "material and controlling fact" in the lower court that was not in the record before this Court when the case was heard initially in 1967.

There are limits to the federal courts' broad powers of habeas corpus jurisdiction over state judgments. See, *e.g.* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335 (1952); Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 63 (1956): "[I]t is conventionally assumed that perpetuation of federal district court habeas corpus jurisdiction is not constitutionally required, on the theory that Congress is free to give what items of federal jurisdiction it chooses to courts which, unlike the Supreme Court, exist only by congressional sufferage." 66 Yale L.J., supra at 63; and note, *Remedies against the United States and its Officials*, 70 Harv. L. Rev. 827, 864-875 (1957).

Suppose Congress took away habeas corpus jurisdiction over state prisoners from all lower courts and reposed it solely in this Court. This Court has already considered *Biggers* and divided evenly on it 4 to 4. Would Biggers be allowed to relitigate this same contention again whenever new Justices come to the Court? Logic dictates not.

The District Judge mentioned the "fortuitous circumstance" of this Court being evenly divided, thus the

prisoner's relief being denied. Suppose in a federal habeas corpus case (after all the state judges had found no federal constitutional error) the United States District Judge finds error and grants the writ. The appellate court reverses 2 to 1. The prisoner will be returned to jail, assuming this Court doesn't grant further review, yet two federal judges have decided the prisoner wrongfully incarcerated, while an equal number of federal judges have thought his conviction constitutionally sound. The prisoner by this "unfortuitous" circumstance must serve out his sentence.[19]

Section 2244(c) is a valid exercise of Congressional power. Nothing in the legislative history of the statute indicates that Congress intended any exception for 4-4 affirmances. The Senate Report, *supra*, refers only to denials of certiorari as carrying no presumption that federal rights were actually adjudicated. As stated in a note, *Developments in the Law—Habeas Corpus*, 83 Harv. L. Rev. 1038, 1152 (1970), referring to the language used in §2244(c): "It is clear that 'actually adjudicated' questions of law include all dispositions except denials of certiorari."

B. *Case Law*

The Sixth Circuit cited three cases to support its decision that a 4-4 affirmance by this Court does not represent an adjudication. The cases cited and quoted are *Etting v. United States Bank*, 24 U.S. 57, 76 (1826); *Durant v. Essex Co.*, 74 U.S. 107, 112 (1868); and *Anderson v. Johnson, Warden*, 390 U.S. 456 (1968).

[19] In the Radich federal habeas corpus case, the count now stands at 2-2. The District Judge and one dissenting Second Circuit Judge would have denied relief.

Mr. Chief Justice Marshall wrote for the Court in *Etting v. United States Bank*, *supra*. It was necessary in his opinion only to say that the judges were divided and "Consequently, the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting*, *supra*, 24 U.S. at 78.

The Sixth Circuit next quoted from Mr. Justice Field's opinion in *Durant v. Essex Co.*, 74 U.S. 107 (1868). Significantly, the Sixth Circuit *omitted* what is said three paragraphs after the language quoted in their opinion, to wit:

> "The statement which always accompanies the judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. *But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.*" 74 U.S. at 112. (Emphasis added).

The third case relied upon by the Sixth Circuit *Anderson v. Johnson*, 390 U.S. 456 (1968) is not applicable. The per curiam opinion merely stated that the lower court's decision would remain in effect. This language is explained by the fact that none of the eight Justices voted for affirmance—four voted for reversal and four voted to dismiss the writ as improvidently granted.

Not cited by the majority were *United States v. Pink*, 315 U.S. 203, 216 (1942) and *Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910), where in equally divided affirmances, it was emphasized that the decisions were conclusive and binding upon the parties involved, though not authority for subsequent cases. *See also*, *Inman v. Baltimore and O. R.R.*, 361 U.S. 138, 146 (1959) (dissenting opinion of Douglas, J.); *Washington Bridge Co. v. Stewart*, 44 U.S. (3 How.) 413, 424 (1845); and *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798).

A 4-4 affirmance in a criminal case historically and logically means the same as it would in any other case. It means the party taking the appeal, against whom there is a presumption of guilt, has failed to carry his burden of convincing the reviewing court that the judgment below should be overturned.

The consideration this Court gave in 1968 to the stationhouse identification is a factual question. The briefs and the transcript of oral argument show that all aspects of the identification were fully considered. The certiorari grant did not limit the question to voice identification, particularly in view of Rule 23 of this Court which says that a statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

2. The stationhouse identification of Biggers was held fairly and scrupulously and not in derogation of his constitutional rights.

Mrs. Beamer was an intelligent, trained nurse. She had been shown many mug shots of suspects, suspects had been to her home, and she had attended police lineups. All these confrontations had been negative.

Once again on August 17, she was asked to look at a suspect. Seated only with an unidentified woman and Capt. McDaniel, she watched Biggers walk past an open door. She identified him by his physical appearance. Naturally, being conscientious, and remembering well the words, "Shut up or I'll kill you," she confirmed the identification by requesting the police officers to have Biggers speak that sentence.

The evidence both at the trial and habeas corpus hearing is uncontradicted that she gave a good description of her assailant.[20] She was able to clearly see her attacker, and the neon lights (R. 13) along the tracks, as well as the full moon (R. 34), illuminated the rapist's features, as did her house lights.[21] Contrary to what the District Court said, there was no conflict between Mrs. Beamer's trial testimony and habeas testimony. (A. 34) The District Court's statement that "there is also conflict between the testimony given by the police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words" is also erroneous. (A. 34) Only three policemen testified at the trial concerning the identification—Officers McDaniel, Smith, and Bailey. McDaniel said she identified him without any hesitation—"That, and she also by voice, yes, sir."[22]

---

[20] The District Court erred here (A. 33). Mrs. Beamer gave eight characteristics (A. 123-125).

[21] The District Court erred here (A. 33) when it said, "The entire episode occurred in very dim light and the rape itself occurred in moonlight." Mrs. Beamer looked into Biggers' face in her house (R. 33) enough to identify him. Neon lights were over the tracks also (R. 13, 34).

[22] McDaniel's testimony is somewhat ambiguous. He was never asked at the 1965 trial whether she identified him first by appearance or by voice, but to the extent it can be gleaned from his testimony, she identified him first by appearance (R. 66, 73).

Smith and Bailey said unequivocally she identified Biggers before she heard him speak. (Smith, R. 40; Bailey, R. 79). At the habeas corpus hearing, McDaniel on being asked this question the first time, said Mrs. Beamer identified Biggers before he spoke. (A. 80). Officer Bailey also repeated his trial testimony that Mrs. Beamer identified Biggers prior to his speaking. (A. 134)[23]. McDaniel and Bailey were the only officers who testified at the habeas hearing.

The showup in *Stovall v. Denno*, 388 U.S. 293 (1967) was more suggestive than this one. There three policemen and two prosecutors showed Stovall to the victim in her hospital bed. Contrary to what some have read into the opinion, there is no indication that Mrs. Behrendt's physical condition would preclude a later identification. She later recovered to testify against Stovall, but her hospital bed identification was made while she was seriously ill, in mental or physical anguish, or drugged, or all three. This is quite different from the identification made by Mrs. Beamer, a woman who had over the months viewed many suspects in person singly, in lineups and in photographs calmly and dispassionately.

The showup here was also less suggestive than the one in *Coleman v. Alabama*, 399 U.S. 1 (1970). There, the victim

23 What gives this police testimony the ring of truth, and what has been overlooked, is that when this record was made in 1965 showing unequivocally that Biggers was identified before he spoke, there was no incentive for, the police to shade the facts since it did not make any constitutional difference. A year later Judge Jones wrote in his dissent in **Wade v. United States**: "It follows from the opinion of the majority that it is improper for observers of a crime to see a person suspected or accused of the offense prior to trial. I had no notion that this was prohibited. I do not think it has been previously held that putting a suspect or an accused in a lineup and treating him in the same manner as the others are treated is or may be a violation of a constitutional right." Wade v. United States, 358 F.2d 557, 560-561 (5th Cir. 1966).

Reynolds, on two occasions told the police he was unable to provide much information as to the description of his attackers. His description was "young black males, close to the same age and height." The two turned out to be one 18 and 6'2" and the other 28 and 5'4-1/2". Contrast this with Mrs. Beamer's description which matched Biggers perfectly. In *Coleman*, Reynolds, unlike Mrs. Beamer, didn't communicate his identification until after the defendant spoke. Mrs. Beamer, however, told all the officers right away that this was the man. The time lapse between assault and identification in *Coleman* was two months eight days; in *Biggers*, six months twenty-six days. Reynolds testified that when the police asked him to go to the city jail he "took [it] for granted" that the police had caught his assailants. *Coleman*, *supra*, 399 U.S. at 6. Mrs. Beamer went only to view another suspect, as she had done many times before.

The District Court made five additional errors of fact. They are:

1.

"(T)here is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screening of Metro Jail inmates no other efforts were made." (Order A. 41).

The record shows that Captain McDaniel consulted with Judge Tatum of the Juvenile Court and his superior at the jail. (A. 69-75). It was not possible at such short notice to find someone whose age and size were comparable to Biggers. (A. 72). The District Judge's assertion that "there are several other prison facilities in the area and there is no evidence that any effort was made to screen

them for subjects" (A. 41), overlooks the realities of police practice. The city police have no authority to use people from the State prison for lineups. This was in 1965. Even in 1972 we doubt if local police departments are permitted to go to local prisons to get lineup subject.

The District Court seems also to have forgotten that at the habeas corpus hearing the burden of proof was on Biggers. No proof was offered that one or more unusually large (200 lb.) 16 year old boys may have been available if the police had made the effort. The testimony was *uncontroverted* that the police *did* make the effort and no children of the size of Biggers were available.

2.

"The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime." (Order A. 41).

This statement of the District Judge has no basis in the record. If by a "good view" the Court means a prolonged look in good lighting, perhaps that statement is valid. Mrs. Beamer said she was able to see him "right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was." (R. 33).

She was with him fifteen minutes or more walking along the tracks under neon lights which hung over the tracks. (R. 13). Her testimony that she could see Biggers in enough light to know who he was is uncontroverted.

3.

"The witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant." (Order A. 41).

The District Court apparently was under the mistaken impression that Mrs. Beamer was asked to and was unable to give "an independent photographic identification of the suspect." She looked at numerous mug shots, none of which were of Biggers and told the police that none of them was her assailant. Since Biggers had no prior record (his 16th birthday was only four days before he raped Mrs. Beamer, R. 104), the police had no pictures of Biggers.

We respectfully disagree with the District Court's statement that Mrs. Beamer was unable to give a good physical description of her assailant. See the eight characteristics she gave the police. (A. 124-125). Captain McDaniel commented on Mrs. Beamer's description of her assailant: "She gave at that time, on January the 22nd, if I can just glance over this, she might have——." (A. 87). The Court interrupted him and neither the State attorney nor Biggers' attorney pursued it, although it was obvious Captain McDaniel had brought to court and could testify from the police document showing the description Mrs. Beamer had given the night of the rape.

4.

"The hesitancy of the witness in identifying the petitioner." (Order A. 41).

The ***only*** testimony about "hesitancy" on Mrs. Beamer's part came from Officer McDaniel at the trial, who said

she made the identification "without any hesitation." (R. 66). A fair reading of all the officers' testimony is that she identified him at once. Biggers was asked to speak merely for confirmation.

One can imagine a defense attorney's argument of police incompetence if the police had exhibited Biggers to Mrs. Beamer *without* giving him an opportunity for her to hear his voice. It would have been the same as the argument that would have been made in *Stovall* had the police not taken Stovall to the victim's bedside had she not recovered.

Biggers' testimony indicates Mrs. Beamer may have hesitated although in Biggers' testimony it was he who hesitated. When he spoke, he said she nodded her head to identify him. (R. 108). The reason why Biggers' testimony is not necessarily inconsistent with the State's witnesses is that Mrs. Beamer identified Biggers when he was paraded past her. Then Biggers was brought to a face to face confrontation where he was told to speak.

5.

"Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant." (Order A. 41).

Throughout the record all the police as well as Mrs. Beamer testified that she was to look at a "suspect." There is not *one word* in the record that would support a finding that the police thought Biggers to have been her assailant. Remember she had previously looked at mug shots, had suspects brought to her home, and attended numerous lineups.

This conclusion of the District Court that the police had told Mrs. Beamer they thought Biggers was her assailant

is demonstrably and completely without any support in the record, even by inference.

In addition to these five misunderstandings of the record and unsupported conclusions of fact, we have previously mentioned the trial court's finding that Mrs. Beamer changed her story between the trial and the habeas corpus hearing and that the police changed their story to show that she identified him only when he spoke. This is simply an inaccurate reading of the trial record, and we have demonstrated its inaccuracy by citing the names of the witnesses and the pages of their trial testimony which support the opposite conclusion.

This is not a case of the trial judge weighing the credibility of witnesses. All the instances of factually inaccurate conclusions made from the record have been made from an *uncontradicted* record. Conclusions of law premised on such a misunderstanding of the trial record should not be allowed to stand. If the premises are faulty, the conclusion is bound to be faulty.

This case will not fit within the framework of *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966) where the identification was by voice alone. We have no quarrel with *Palmer v. Peyton*. If such a doctrine did not exist it would be necessary to create one. As this Court recently said again in *Kirby v. Illinois*, 406 U.S. ___ (1972), it is possible for a confrontation to be so suggestive as to violate due process. This is not one of those cases.

Dr. Pollack, the expert witness, assumed that Mrs. Beamer's "primary mode of identification was through voice ..." (A. 104). He made that assumption by taking part of Captain McDaniel's testimony out of context (See testimony of McDaniel at R. 66, quoted by Pollack at

A. 104). His conclusions are subject to question because of the mistaken underlying factual assumptions.

This is not a constitutional case involving voice identification alone. A woman of honest repute got a good look at her attacker. She sat calmly in an office in the police station with Captain McDaniel and another woman. Two officers brought the defendant in her view. Without hesitating she made a positive identification. She was even more certain when she heard him speak. No one suggested to her "this is the man."

The error of the District Court below in misreading the 1965 trial record and in ignoring the uncontradicted habeas corpus testimony was not of law but of fact. Since the premises of fact are contradicted by the record, the conclusions of law should be re-examined. The record shows the identification was fairly conducted.

CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for the federal writ of habeas corpus dismissed.

Respectfully submitted,

BART C. DURHAM, III
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219
Telephone: (615) 741-2091

Of Counsel
DAVID M. PACK
Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 584—September Term, 1971.

(Argued March 24, 1972 Decided April 26, 1972.)

Docket No. 71-2185

UNITED STATES *ex rel.* STEPHEN RADICH,

Petitioner-Appellant,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. MCGRATH, New York City Commissioner of Correction,

Respondents-Appellees.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

---

* * *

Appendix A

MULLIGAN, *Circuit Judge* (dissenting):

Stephen Radich, the petitioner herein, is an art dealer convicted in the Criminal Court of the City of New York of casting contempt on the American flag in violation of what was then § 1425(16)(d) of the New York Penal Law by virtue of his display of "new art" forms described in the majority opinion. From the beginning Radich has been represented by able counsel of the American Civil Liberties Union who questioned the constitutionality of the statute under which he was convicted. He was found guilty in a two-to-one decsion of the Criminal Court (*People* v. *Radich*, 53 Misc. 2d 717 (1968)) with opinions by both the majority and dissent. The Appellate Term of the Supreme Court, First Department affirmed unanimously without opinion. (*People* v. *Radich*, 57 Misc. 2d 1082 (1968)). A divided New York Court of Appeals (5-2) affirmed the conviction with majority and dissenting opinions. *People* v. *Radich*, 26 N.Y.2d 114 (1970). The Supreme Court granted review on October 19, 1970 to consider the same constitutional issues which are now pre-

sented to the Federal District Court. (See *Radich* v. *New York*, 39 U.S.L.W. 3161). On February 22, 1971 the issues were argued before the Supreme Court and on March 24, 1971 the United States Supreme Court rendered its decision:

> "PER CURIAM.
>
> "The Judgment is affirmed by an equally divided Court.
> "MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case."

Radich v. *New York*, 401 U.S. 531. Although the Supreme Court said it affirmed the judgment of the New York Court of Appeals, the majority opinion here reaches the conclusion that the Court made no actual adjudication at all because a majority could not reach any decision on the merits and that petitioner, whose petition for rehearing was denied on May 7, 1971 (402 U.S. 989), is now free to again urge these very issues in a *habeas corpus* petition in the United States District Court for the Southern District of New York. I cannot subscribe to this view.

Whatever the law before 1966, it is now evident that we are called upon to construe Title 28 U.S.C. § 2244(c), the purpose of which was "to provide a qualified application of the doctrine of *res judicata* . . . to proceedings on applications for *habeas corpus* by state prisoners." H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3, 8, 13 (1966).[1]

---

[1] It is interesting to note that the only case in point, *United States ex rel. Biggers* v. *Neil*, 448 F.2d 91 (6th Cir. 1971), *cert. granted*, —— U.S. ——, 40 U.S.L.W. 3410 (Feb. 2, 1972) does not discuss or even cite in either the majority or dissenting opinions, the governing statute § 2244(c). The majority opinion is based upon pre-statutory case law evolving before the *res judicata* bar enacted by Congress in 1966. It is in accord with the majority here but in view of its failure to construe the statute, I cannot find it convincing and certainly not persuasive.

The subsection which is set forth in full in footnote 3 of the majority opinion, in essence makes a prior judgment of the Supreme Court conclusive as to all issues of fact or law in a state prisoner's federal *habeas corpus* proceeding, where these issues have been actually adjudicated by the Supreme Court.[2]

Our inquiry therefore is what did the Congress intend by the phrase "actually adjudicated." The Senate Report which provides the legislative history of the subsection states: "This subsection is intended to give a conclusive presumption only to actual adjudications of federal rights by the Supreme Court, and *not to give such a presumption to mere denials of writs of certiorari.*" Sen. Rep. No. 1797, 89th Cong., 2d Sess., in 1966 U.S. Code, Cong. & Ad. News 3663, 3664.[3] (Emphasis added)

The majority opinion takes the position that an affirmance of a state court judgment by an equally divided court has "no more legal significance for *habeas* purposes than denial of *certiorari*, which has never precluded subsequent collateral relief. *Brown* v. *Allen*, *supra*, at 456, 458-59, 489-94 (1953)." *Brown* v. *Allen*, 344 U.S. 443 (1953) does not deal with or even mention affirmances by an equally divided bench but rather is concerned with mere

---

[2] There is no question of fact here but rather legal issues of the constitutionality of § 1425(16)(d) of the Penal Law of New York under which the defendant was convicted. All of these issues were as pointed out above before the Supreme Court.

[3] "It is clear that 'actually adjudicated' questions of law include *all* dispositions except denials of certiorari" Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1152 (1970) (emphasis added and footnote omitted). See also 45 Texas L. Rev. 592, 595 n. 27 (1967).

denials of writs of certiorari.[4] Moreover, Mr. Justice Frankfurter's reasoning in finding that a mere denial of a writ of certiorari by the Supreme Court in a state prisoner case did not bar a subsequent *habeas corpus* application is most illuminating. In his opinion for the court on this point he stated:

> "These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudica-

---

[4] It should be noted that § 2244(c) refers to a prior judgment of the Supreme Court "on an appeal or by a writ of certiorari". The dismissal of a writ may nonetheless have *res judicata* effect if the circumstances reveal that the court has dismissed on the merits, see *Duncan* v. *Carter*, 299 F.2d 179 (9th Cir.), *cert. denied*, 370 U.S. 952 (1962). In that case a defendant's criminal conviction had been affirmed by the California Supreme Court. The United States Supreme Court initially granted certiorari, but after oral argument on the merits, it dismissed the writ with a brief statement: "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petitions for certiorari. . . ." *Baldonado* v. *California*, 366 U.S. 417 (1961). The defendant then commenced a federal habeas corpus action, raising the same constitutional issues that she had placed before the Supreme Court. In affirming the district court's refusal to grant the writ, a panel of the Ninth Circuit concluded that the Supreme Court had "actually adjudicated" these claims and hence it was bound to follow that Court's decision. Although this case was decided prior to the enactment of § 2244(c), were the same question to be presented today, habeas corpus relief would be barred under the present statute. Compare *Miller* v. *Carter*, 434 F.2d 824, 826 (9th Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

tion or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate. Equally unsatisfactory as a means of evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed. We would have to have very different records and to alter our consideration of these cases radically if a denial could fairly be deemed to be an undisclosed decision on the merits. In a few cases the issues before the District Court had not even been raised here. In other cases, the emphasis put on the issues here differed considerably from that put on them in the District Courts. Alice could understand, but not I, how under such circumstances a district judge could assume if he is so minded that we 'decided' the question now presented to him." *Brown* v. *Allen, supra,* 344 U.S. at 493-94 (footnotes omitted).

None of the obfuscations and inadequacies surrounding the denial of the writ of certiorari which led Mr. Justice Frankfurter to deny them significance for habeas purposes are present here. Mr. Radich is not an illiterate inmate of a New York State prison—he hasn't spent any time in custody since his 1968 conviction. He has always been represented by competent counsel who have clearly presented his constitutional arguments to the State courts and the United States Supreme Court. There was an ample record from the State courts with written opinions artic-

ulating clearly the majority and dissenting positions. There has been nothing peremptory or perfunctory in the disposition by the Supreme Court which heard argument on the merits and which voted on the merits. Radich even petitioned for reargument and lost. He has had his day in the Supreme Court and more. He failed to persuade a majority of the justices that the statute was unconstitutional and therefore lost.[a]

There is nothing startling in the proposition that an even vote constitutes an affirmance of the judgment appealed. This has long been held and never challenged. While a 4-4 affirmance does not become a binding precedent, the law of the case has been fixed. Thus the Supreme Court held in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) "The judgment is as conclusive and binding upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." In *United States* v. *Pink*, 315 U.S. 203, 216 (1942) Mr. Justice Douglas stated that a 4-4 affirmance is "conclusive and binding upon the parties as respects that controversy." In *Hertz* v. *Woodman*, 218 U.S. 205 (1910) the Supreme Court said at pages 213-14:

> "Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and *adjudication* of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an

---

[a] *Fay* v. *Noia*, 372 U.S. 391, 424 (1963) relied upon by the majority requires that federal constitutional rights of personal liberty "shall not be denied without the fullest opportunity for plenary federal judicial review." The record before us establishes in my view that the petitioner here assuredly had that opportunity.

authority for the determination *of other cases*, either in this or in inferior courts."* (Emphasis added)

The majority's argument that since there was equal division there was no decision on the merits and therefore no adjudication under the statute is not only without authority but is of course *petitio principii*. The fact that no opinion is written is obviously unimportant. If the court had simply stated that the judgment is affirmed 5 to 3 that would constitute an adjudication by the Supreme Court. Here the court said "The judgment is affirmed by an equally divided Court." This is an adjudication. The court said so and I believe we should take it at its word.

---

* Mr. Justice Brennan's statement in *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960) that "nothing is settled" by an equally divided court, as I read it, refers not to its lack of finality as to the parties before the court, but rather that it does not settle the law and has no precedential value. It is an adjudication *ex necessitate sed ex lege*.

APPENDIX B

40 CINCINNATI LAW REVIEW 883-891 (1971)

HABEAS CORPUS—RES JUDICATA—A PREVIOUS AFFIRMATIVE OF PETITIONER'S STATE COURT CONVICTION BY AN EQUALLY DIVIDED SUPREME COURT DOES NOT BAR A REVIEW OF THE CONVICTION IN A FEDERAL HABEAS CORPUS PROCEEDING.—*Biggers v. Neil*, 448 F.2d 91 (6th Cir. 1971).

After a trial by jury in a Tennessee State court, Archie Biggers was convicted of rape and sentenced to a term of twenty years. Biggers' conviction was based on evidence from a pretrial identification of his voice by the victim of the rape, some seven months after the crime's commission. The identification procedure was a showup,[1] in which the police presented to the complaining witness a single suspect

---

[0] *See id.* at 1024.

[1] The showup procedure should be contrasted with the more familiar lineup in which the witness must identify the culprit from a group of people, thus forcing the witness to be more selective in his identification.

for identification. During the showup at the station house, Biggers was compelled to repeat the words spoken by the rapist the night of the crime. At this confrontation between Biggers and the prosecutrix, he was neither assisted by counsel nor offered an opportunity for such assistance. The Supreme Court of Tennessee subsequently affirmed the conviction, holding that Biggers' fifth amendment right against self-incrimination had not been violated.[3] On certiorari to the United States Supreme Court,[4] Biggers' petition presented the question of whether the voice identification had violated his right of due process.[5] The judgment of the State court was affirmed per curiam by an equally divided Court,[6] with Mr. Justice Douglas dissenting in the only full, written opinion.

In a collateral attack on the judgment, Biggers obtained a writ of habeas corpus after a full hearing and review before the United States District Court for the Middle District of Tennessee. The district court found that the circumstances of the case were not so urgent as to warrant the use of the showup procedure. Since the police could have arranged the more reliable lineup type of procedure, the court concluded that the use of evidence from the showup, which tended to maximize the chances for misidentification, denied Biggers due process of law. On appeal to the Court of Appeals for the Sixth Circuit, *held:* Affirmed.[8] The district court decided a different question from the one presented to the Supreme Court and, in any case, the affirmance by an equally divided Court did not constitute a federal adjudication of Biggers' constitutional claims: therefore the district court was not precluded from entertaining the petition for a writ of federal habeas corpus in respect to the pretrial identification procedure.[7]

Historically, the power of the federal courts to issue writs of habeas corpus was possible only by specific grants of such jurisdiction by Congress.[8] Since the Constitution simply provides that neither Congress nor the executive branch shall suspend the writ of habeas corpus except in the case of a rebellion or an invasion,[9] it was left to the legislature to delineate the scope of the writ by statutory

---

[3] Biggers v. State, 219 Tenn. 555, 411 S.W.2d 696 (1967).

[4] Biggers v. Tennessee, 390 U.S. 404, *reh. denied*, 390 U.S. 1037 (1968).

[5] Although the Supreme Court had held in United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) that the accused must be given the opportunity for assistance by counsel during a lineup, the requirement was not given a retroactive effect, and thus Biggers' lack of counsel at the showup was not in itself a denial of federal rights.

[6] 390 U.S. 404. For the Supreme Court's policy in granting rehearings after an equally divided decision refer to R. Stern & E. Gressman, Supreme Court Practice 522-24 (4th ed. 1969).

[7] Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971).

[8] *Id.*

[9] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *But see* Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605.

[9] U.S. Const. art. I, § 9, cl. 2.

enactment. The Judiciary Act of 1789[10] supplied the federal courts with habeas jurisdiction to examine the legality of a prisoner's detention who was then "in custody, under or by colour of the authority of the United States."[11] The writ did not extend to persons in custody by authority of a state.[12] Not until the Habeas Corpus Act of 1867[13] did the federal courts' habeas jurisdiction extend to state prisoners.

From 1867 to 1952 the habeas jurisdiction of the federal courts was carefully limited in respect to state prisoners. The availability of the writ to state prisoners was first based on a jurisdictional concept.[14] For example, where a prisoner's conviction rested upon an unconstitutional statute, the judgment was void for lack of jurisdiction and thus open to collateral attack.[15] The scope of the writ was restricted to the question of whether the state court had acted within its authority and not whether error of fact or law had been committed in the state proceedings.[16] If the state court acted with proper jurisdiction, the due process requirement of the fourteenth amendment was duly satisfied.[17]

Defining the law of federal habeas corpus as of 1915, the Supreme Court in *Frank v. Mangum*[18] held that the writ was not available to a state prisoner, convicted by a court of competent jurisdiction, where his claim of denial of federal rights had been given an adequate review by the state judicial process.[19] However, eight years later, in *Moore v. Dempsey*,[20] the Court indicated that the adequacy of the state processes did not necessarily prohibit a redetermination of a valid federal question which affects the finding of guilt. The decision marked a shifting in the Court's focus from deference to state court adjudications to the expansion of due process rights for the individual.[21]

---

[10] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[11] *Id.* at 82.

[12] *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[13] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2241 (1964)). *See also* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

[14] The Supreme Court further required the habeas petitioner to exhaust his state remedies before a federal court would consider his application. *Ex parte* Royall, 117 U.S. 241 (1896).

[15] *See id.* at 248.

[16] *See, e.g., In re* Wood, 140 U.S. 278 (1891).

[17] *In re* Converse, 137 U.S. 624 (1891).

[18] 237 U.S. 39 (1915).

[19] *Id.*

[20] 261 U.S. 86 (1923).

[21] For a discussion of the effect of *Moore* on the *Frank* decision and whether the cases can be reconciled, refer to Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 478-92 (1963); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1328-30 (1961); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1050-54 (1970).

In 1953 any ambiguity in the law of federal habeas corpus with respect to state prisoners was resolved by the Supreme Court in *Brown v. Allen*.[23] That case held that a state prisoner could have his federal constitutional claims fully litigated in a federal court although these same claims had been rejected on the merits by the state court.[23] Subsequent decisions have asserted the principle that "...conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[24]

In *Biggers*,[25] the court relied on the broad notion that res judicata does not apply to federal habeas corpus proceedings as a justification for its inquiry into the petitioner's conviction despite the affirmance by the Supreme Court. Notably the court did not discuss, in this regard, the application of Title 28, Section 2244(c) of the United States Code.[26] This section provides that in a federal habeas corpus proceeding a prior judgment by the Supreme Court on direct review is conclusive as to all issues of law or fact "actually adjudicated" by the Court.[27] The only stated exception to this rule is where the habeas petitioner demonstrates the existence of a "material and controlling fact" not in the record before the Supreme Court.[28] The legislative intent of this section was "for a qualified application of the doctrine of res judicata."[29] Contrary to the majority opinion of

---

[23] 344 U.S. 443 (1953).

[23] One possible reason for this expansion of federal habeas corpus was that "with the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155 (1970).

[24] Fay v. Noia, 372 U.S. 391, 424 (1963).

[25] 458 F.2d 91.

[26] 28 U.S.C. § 2244(c) (Supp. IV, 1969), *amending* 28 U.S.C. § 2244 (1964):

> In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State Court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State Court, shall be conclusive as to all issues of fact or law . . . actually adjudicated by the Supreme Court therein, unless the applicant . . . shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

[27] *Id.*

[28] *Id.*

[29] S. REP. No. 1797, 89th Cong., 2d Sess., 1966 U.S. CODE CONG. & AD. NEWS 3663, 3664. The Habeas Corpus Committee, which recommended these amendments, was composed of federal judges who considered these recommendations to be consistent with recent Supreme Court rulings on habeas corpus. The judges felt they were bound to follow these decisions.

the court of appeals, this provision of the Code emphasizes that res judicata has not been completely jettisoned in federal habeas jurisdiction.

The purpose and scope of section 2244(c) is consistent with previous Supreme Court rulings on habeas corpus.[30] Where a constitutional claim has received plenary review in the state courts, a federal habeas corpus proceeding to relitigate this claim has been justified on the grounds that a state prisoner is entitled to a *federal* review of his constitutional rights.[31] If the Supreme Court has given a state prisoner such a review on direct appeal, then the lower federal courts are justified in denying him a writ of habeas corpus to relitigate the same issue.

For res judicata to apply in any case, the issue in question must have been resolved in an earlier decision. In *Biggers* the court attempted to distinguish the issues before the Supreme Court and the district court as an alternate basis for affirming the grant of habeas corpus. The court concluded that the Supreme Court's review was limited to the question in the application for certiorari; that is, whether the failure to provide counsel or to arrange a lineup resulted in an unfair identification of Biggers' voice which violated his right of due process.[32] The court of appeals insisted that they were determining the constitutionality of the showup procedure as used in this case, and were not reaching the narrower issue of the voice identification as presented to the Supreme Court.

In its discretion, the Supreme Court does limit the review on certiorari to the questions in the application.[33] As the dissenting judge noted in *Biggers*, however, the petitioner admitted to the court of appeals that the Supreme Court had reviewed the broad questions of due process in relation to the "totality of circumstances" concerning the identification procedure. The dissent also noted that the petitioner had presented such questions in his brief before the Supreme Court. The majority dismissed this fact, asserting that a brief cannot expand the scope of the Court's consideration. However,

---

[30] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[31] Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 106-07 (1959).

[32] The exact question upon which the Supreme Court granted certiorari was:

> The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months earlier for voice identification by the prosecutrix.
>
> Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a line-up, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights?

488 F.2d at 96.

[33] REV. R. SUP. CT. 23(1)(c).

Rule 40(1)(d)(2) of the Supreme Court's Revised Rules[34] states that the questions in petitioner's brief may be differently phrased and will be reviewed where these questions are not substantially different from those presented in the application. Assuming for the moment that the petition presented only the narrow issue of voice identification, Rule 40(1)(d)(2) at least indicates that the Supreme Court's review is not inflexibly riveted to the exact wording of a petition as the majority suggested.

Actually, the petition for certiorari specifically stated that Biggers was alone before the prosecutrix during the identification, that the police failed to provide a lineup, and that there was a seven month interval between the crime and the identification.[35] The majority in *Biggers* held that the petition did not question the constitutionality of the showup procedure and was limited solely to the voice identification issue. On the contrary, the facts presented in the petition clearly indicate that the entire identification procedure was put in issue. Curiously, these same facts were used by the district court as grounds for deciding that the showup procedure violated due process. The distinction drawn by the majority in *Biggers* between the issue decided by the district court and the issue they say was before the Supreme Court is more semantic than substantive. It demonstrates an attempt to artificially narrow the question presented on certiorari.

Although Mr. Justice Douglas treated the broad question of due process raised by the facts, the court in *Biggers* reasoned that his opinion only reflected the consideration of the four dissenters. Pursuing this line of reasoning, the circuit court concluded that the four Justices who voted for affirmance without recording their opinions may have considered only whether the voice identification in itself was a denial of due process. Such a conclusion is simply not supported by the facts.

Assuming that the issues before the Supreme Court and the district court were the same;[36] the crucial question, then, is whether the affirmance by an equally divided Court was a decision on the merits. Where the Supreme Court has adjudicated a federal question, raised in a direct appeal from a state court judgment, the res judicata doctrine of section 2244(c) will bar federal habeas relief. The majority in *Biggers* reasoned that the Supreme Court's affirmance was purely

---

[34] Rev. R. Sup. Ct. 40(1)(d)(2):

> The phrasing of the questions presented need not be identical with that set forth in the . . . petition for certiorari, but the brief may not raise additional questions or change the *substance* of the questions already presented in those documents. (Emphasis added.)

[35] *See* note 32 *supra*.

[36] This assumption was also made—at least implicitly—by the court of appeals in respect to their discussion of the applicability of res judicata and the effect of the equally divided decision of the Supreme Court. The question of res judicata and the effect of an equally divided Court are important only if the issues were the same before both courts.

technical since the Court could only affirm where there was no majority to reverse. The authorities which the court cited in support of this contention more forcefully hold, as argued by the dissenting judge, that an equally split decision does not settle any principle of law and hence the case lacks precedential value.[37] As an indication of an evenly split decision's lack of precedential value, the Court ordinarily does not write an opinion.

> The usual practice of not expressing opinions upon equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment.[38]

In previous Supreme Court cases involving or interpreting the result of an equally divided vote of the Court,[39] it was emphasized that the judgment of the evenly split Court, though not an authority for subsequent cases, was a conclusive and binding decision upon the parties involved. Furthermore, in two other cases[40] explaining the effect of a decision by an equally divided Court, there is language which suggests that such a decision is definitely a disposition on the merits. In any case where a party appeals to the Supreme Court, he has the burden of convincing a majority of the Court. Consequently, if he fails to carry his burden, he loses on the merits. In Biggers' appeal before the Supreme Court, he was given a complete review of his constitutional claim, and the Justices did vote on the merits of the case. While the Court had to affirm, since a majority vote is needed to reverse, it was nonetheless upon a full hearing of the merits. In this particular situation, the wisdom is questionable which would allow

---

[37] Anderson v. Johnson, 390 U.S. 456 (1968); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868); Etting v. United States Bank, 24 U.S. (11 Wheat.) 59, 78 (1826). The dissent cited: United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); United States v. Worrall, 2 U.S. (2 Dall.) 384 (1798).

Etting v. United States Bank and *Durant v. Essex Co.*, cited by the majority as explaining the effects of an equally divided decision, are civil cases. Since the *Biggers* case involved a state prisoner's claimed denial of constitutional rights, there would be a strong policy consideration to strictly interpret the res judicata effect of an equally divided decision. However, the court of appeals did not articulate this consideration since they were able to interpret these civil cases as holding that an equally divided decision does not reach the merits.

In the one criminal case cited by the majority, *Anderson v. Johnson*, the per curiam opinion merely stated that the lower court's decision would remain in effect. This language is explained by the fact that none of the eight Justices voted for affirmance—four voted for reversal and four voted to dismiss the writ as improvidently granted.

[38] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960).

[39] *See* United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868).

[40] *See* Inman v. Baltimore & O.R.R., 361 U.S. 138, 146 (1959) (dissenting opinion of Douglas, J.); Washington Bridge Co. v. Stewart, 44 (3 How.) 413, 424 (1845).

a single district court judge to cast the deciding vote for reversal of a conviction which the Supreme Court had affirmed.

As for the applicability of section 2244(c) to an equally divided decision of the Court, the res judicata principle of this section precludes federal habeas relief where the issues had been "actually adjudicated" in a prior judgment of the Court. Congress intended that the section include those dispositions of federal claims which were more than mere denials of certiorari.[41] If the statute's scope includes something more than a denial of certiorari, perhaps an equally divided decision after a full hearing can reasonably be regarded as an actual adjudication, or at least operating as an adjudication upon the merits. An evenly split decision in this context certainly carries substantially more weight than a denial of certiorari.[42]

Because of the equally divided vote on appeal, the *Biggers* case presents a unique opportunity to probe the significance and applicability of section 2244(c),[43] which the court unfortunately failed to utilize. The typical federal habeas corpus proceeding occurs where the Supreme Court has not directly reviewed the state court judgment or where the review was denied, and hence section 2244(c) would not bar the habeas corpus proceeding. But where review is granted and there is an actual adjudication, section 2244(c) will clearly bar those issues adjudicated from being raised in a federal habeas corpus proceeding. Thus, the doctrine of res judicata embodied in this section will foreclose some collateral attacks by federal habeas corpus.[44]

The fact that the *Biggers* court was faced with a novel situation is underlined by its approach to the case. At one point in its reasoning, in justification of the district court's grant of habeas corpus, the court implicitly assumed that the Supreme Court's 4–4 vote to affirm was a decision on the merits.[45] In a subsequent line of reasoning, the court

---

[41] *See* note 29 *supra*.

[42] A denial of certiorari only means that there were not at least four Justices who wanted to review the case. Brown v. Allen, 344 U.S. 443, 489-97 (1953); Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.).

[43] In the only case construing section 2244(c), the court held that a dismissal of certiorari was not an "adjudication" within the meaning of the statute, but rather the equivalent of a denial of certiorari. Miller v. Carter, 434 F.2d 824 (9th Cir. 1970).

[44] Since the Supreme Court usually reviews only those facts presented in the state record, it would be advisable in light of section 2244(c) to avoid direct review by the Supreme Court where a factual issue had not been fully developed in the state record. The Supreme Court's review in this situation would preclude this issue from being considered in a subsequent petition for habeas corpus. For this reason, it would be advantageous for the state prisoner to first seek a writ of habeas corpus in the federal courts, which have the power to grant an evidentiary hearing to develop the inadequate trial record.

[45] The court in *Biggers* stated that the issues before the district court and the Supreme Court were different. Distinguishing the issues before the two courts is necessary only if the Supreme Court's affirmance was a decision on the merits.

argued that the equally divided decision was not an adjudication on the merits. These alternate rationales, which attempt to cover all possible contingencies raised by the situation, at the very least weaken the decision as authority for a similar case. Furthermore, the case's authoritative value is already undercut by the fact that the *Biggers* court completely overlooked the res judicata limitation of section 2244(c) as applied to federal habeas relief for state prisoners. While section 2244(c) does not cut a broad swath into the habeas jurisdiction of federal courts, it at least expresses a legislative intent to draw some boundaries. Its purpose was to provide a qualified principle of finality in criminal litigation. By ignoring this section, the court in *Biggers* failed to recognize any such limits to the federal courts' broad power of habeas jurisdiction over state judgments.

ROBERT J. HOLLINGSWORTH

---

and therefore had a conclusive effect on the issue decided. In other words, why distinguish the issues if the Supreme Court's affirmance meant nothing? Also, the discussion of the inapplicability of res judicata to federal habeas corpus is apparently directed at the Supreme Court's affirmance of the decision. Unless the affirmance was an actual adjudication, there would be no point in discussing the res judicata effect of the decision.

E COPY

...R. U. S.
...E D
JUL 26 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary,
Petitioner,

against

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
as Amicus Curiae
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Interest of *Amicus*	1
Question Presented	2
ARGUMENT—This Court's prior affirmance of Biggers' conviction, by an equally divided vote, is a jurisdictional bar to consideration of the same issues in a federal habeas corpus hearing	2
Conclusion	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary,
Petitioner,

against

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus*

The decision below, without discussion of the applicable statutory mandate of 28 U.S.C. § 2244(c), held that an equally divided affirmance of a conviction by this Court does not preclude a defendant from subsequently obtaining a writ of habeas corpus on the same issues from a federal district court. The court below also ruled upon the validity of voice identification evidence.

The Attorney General of the State of New York represents petitioners in the case of *Hon. David Ross, et al.* v. *Stephen Radich*, No. 71-1510, petition for certiorari pending before this Court. *Ross* v. *Radich* squarely presents

the question of the meaning and effect of 28 U.S.C. § 2244 (c) and of this Court's 4-4 affirmances. Thus, the Attorney General has a direct interest in this Court's resolution of the issue.

Question Presented

Whether a defendant whose conviction is affirmed 4-4 by this Court may relitigate the same issues in the federal courts despite the explicit Congressional prohibition in 28 U.S.C. § 2244(c)?

ARGUMENT

This Court's prior affirmance of Biggers' conviction, by an equally divided vote, is a jurisdictional bar to consideration of the same issues in a federal habeas corpus hearing.

This Court has unequivocally stated that its divided affirmances are not *stare decisis* as to other parties, but are "as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868); *United States* v. *Pink*, 203 U.S. 194, 216 (1941); *Hertz* v. *Woodman*, 218 U.S. 205, 213 (1909).

28 U.S.C. § 2244(c) provides that this Court's disposition "at the instance of the [same] prisoner" precludes the subsequent issuance of any writ of habeas corpus. Thus, Biggers' request for *habeas* consideration cannot be granted by a federal district judge.

In order to avoid duplication, *amicus* Attorney General of the State of New York respectfully refers this Court to a full analysis of these issues in the pending petition for certiorari in *Ross* v. *Radich*, No. 71-1510, pp. 7-12.

CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for writ of habeas corpus should be dismissed.

Dated: New York, New York, July 25, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
as *Amicus Curiae*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

Supreme Court, U. S.
FILED
AUG 15 1972
MICHAEL RODAK, JR., CLE

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,

Petitioner,

—v.—

ARCHIE NATHANIEL BIGGERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

SHIRLEY FINGERHOOD
RICHARD G. GREEN
1270 Avenue of the Americas
New York, N. Y. 10020
(212) 246-8689

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MELVIN L. WULF
LAWRENCE G. SAGER
American Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,

Petitioner,

—v.—

ARCHIE NATHANIEL BIGGERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of *Amici*

The American Civil Liberties Union, through its cooperating attorneys, represents respondent in the case of *Hon. David Ross, et al.* v. *Stephen Radich,* No. 71-1510, petition for certiorari pending before this Court. The question in *Radich* is whether 28 U.S.C. §2244 permits issues which were raised in an appeal from a State Court conviction to this Court, where the Supreme Court affirmed because it was equally divided, to be considered in a subsequent habeas corpus proceeding. That issue was decided affirmatively by the Court of Appeals for the Sixth Cir-

cuit in this case, as well as by the Second Circuit in the *Radich* case. Thus, *Amicus* has a direct interest in this Court's review of that decision herein.*

Question Presented

Whether an equal division of this Court which results in an affirmance of a State Court conviction is an actual adjudication of Federal constitutional issues within the meaning of 28 U.S.C. §2244(c) and therefore a bar to consideration of those issues in a subsequent habeas corpus proceeding.

ARGUMENT

In considering the question with which *Amicus* is concerned the Sixth Circuit stated below that it did not believe "logically or historically a 4-4 division of the United States Supreme Court can be held to represent any federal adjudication of appellant's federal constitutional claims on the merits" (448 F.2d 91, 97).

The decision of Court of Appeals for the Second Circuit in *U. S. ex rel. Radich* v. *Criminal Court of City of New York*, 459 F.2d 745 (1972), certiorari petition pending, is in accord. The Second Circuit reviewed Congressional enactments authorizing Federal courts to entertain writs of habeas corpus and this Court's applicable decisions, and concluded that a state convict is entitled thereby to one adjudication by a federal court of federal constitutional issues. Thus, the Congressional purpose behind §2244(c) was found not to be to deprive the habeas petitioner of his day in federal court but to protect the federal courts

* Consents by the parties to the filing of this *Amicus* brief have been filed with the Court.

against vexatious repetitive petitions seeking to relitigate issues already conclusively decided by a federal tribunal.

Neither the respondent in this case, nor Radich, had the merits of his Federal constitutional claims decided by any Federal Court prior to seeking habeas corpus relief. The equal division of this Court on the appeal from the State judgments merely left the State Court determinations of respondents' claims in effect. To rule that the 4-4 affirmance barred subsequent habeas corpus review by a federal court would give the state determinations final effect in contravention of this Court's rule: "The state conclusions of law may not be given binding weight on habeas." *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963).

The Second Circuit found corroboration for its interpretation of Section 2244(c) in another provision of the Judicial Code, 28 U.S.C. §2109, which reveals that Congress does not deem an *ex necessitate* affirmance by an equally divided Court as an actual adjudication on the merits. Section 2109 provides that when a case on appeal from the judgment of a State court cannot be decided in the Supreme Court because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.*" (Emphasis added.) (459 F.2d 745, 750.)

Surely, it cannot be contended that a Supreme Court affirmance in the absence of a quorum could constitute an actual adjudication on the merits within the meaning of Section 2244(c). Since Congress obviously views an affirmance in the absence of a quorum as equivalent to affirmance by an equally divided court, such an affirmance cannot bar subsequent review by habeas corpus.

CONCLUSION

The decision of the Sixth Circuit with respect to this issue should be affirmed.

Respectfully submitted,

SHIRLEY FINGERHOOD
RICHARD G. GREEN
1270 Avenue of the Americas
New York, N. Y. 10020
(212) 246-8689

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MELVIN L. WULF
LAWRENCE G. SAGER
American Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amicus Curiae

FILED
AUG 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-586

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary
Nashville, Tennessee,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

JACK GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University
Law School
Stanford, California 94305

MICHAEL MELTSNER
Columbia University
School of Law
435 West 116th Street
New York, New York 10027

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
404 James Robertson Parkway
Suite 1414, Parkway Towers
Nashville, Tennessee 37217

Attorneys for Respondent

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT:	
A. Introduction	2
B. Proceedings in the District Court	3
C. Proceedings in the Court of Appeals	7
D. The Facts Surrounding the Biggers' Arrest, Identification and Trial	8
SUMMARY OF ARGUMENT	16
ARGUMENT:	
I. The Affirmance by This Court of Respondent's Conviction by an Equally Divided Court Did Not Foreclose Consideration of the Merits of His Claim of Denial of Due Process of Law by Petition for A Writ of Habeas Corpus	19
II. The Courts Below Correctly Decided That The Pre-Trial Identification Proceeding Shown by the Record in This Case Violated the Due Process Clause of the Fourteenth Amendment	35
A. The Absence of Any "Compelling Necessity" in This Case	39
1. No Stovall Death-bed Situation Is Presented	39
2. Considerations of Fairness to the Suspect Did Not Require a "Showup"	40
B. The Absence of Any External Indicia of Accuracy	42
1. No Good or Sustained Opportunity To Observe Assailant	42
2. Excessive Time Lapse in Staging the "Show-up"	43

3. Absence of Any Other Independent Indications of Accuracy 44

C. Additional Grounds Supporting Relief 48

CONCLUSION 50

TABLE OF AUTHORITIES

Cases:

Albany Bridge Case, 69 U.S. 403 (1864) 20

Anderson v. Johnson, 390 U.S. 456 (1968) 21

Bates v. United States, 405 F.2d 1104 (D.C. Cir., 1968) 38, 43, 44

Bowen v. Johnston, 306 U.S. 19 (1939) 34

Clark v. United States, 408 F.2d 1230 (D.C. Cir. 1968) 44

Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1969) 42

Cline v. United States, 395 F.2d 138 (8th Cir. 1968) 43, 44

Coleman v. Alabama, 399 U.S. 1 (1969) 42, 47

Crume v. Beto, 383 F.2d 36 (5th Cir. 1967) 44

Dandridge v. Williams, 397 U.S. 471 (1970) 48

Darr v. Burford, 339 U.S. 200 (1950) 34

Davis v. Mississippi, 394 U.S. 721 (1969) 49

Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868) 20, 22

Epton v. Nenna, 318 F. Supp. 899 (S.D.N.Y., 1970) aff'd 446 F.2d 363 (2d Cir. 1971) 29

Etting v. Bank of United States, 24 U.S. (11 Wheat.) 59 (1826) 19, 20, 28

Fay v. Noia, 372 U.S. 391 (1963) 25, 30, 31, 32

Foster v. California, 394 U.S. 440 (1969) 45

Frank v. Mangum, 237 U.S. 309 (1915) 19

Gregory v. United States, 410 F.2d 1016 (D.C. Cir. 1969) 43, 44

Hanks v. United States, 388 F.2d 171 (10th Cir. 1968) ... 43, 44

Hertz v. Woodman, 218 U.S. 205 (1910) 21

Jones v. Cunningham, 371 U.S. 236 (1963) 32

Kirby v. Illinois, ___ U.S. ___ (1972) 37

Lambros v. Young, 145 F.2d 341 (D.C. Cir. 1944) 21

McDowell v. Ciccone, 275 F. Supp. 957 (D.C. Mo. 1967), aff'd 407 F.2d 257 29

Mackey v. United States, 401 U.S. 668 (1971) 27

Macklin v. United States, 409 F.2d 174 (D.C. Cir., 1969) 43

Moore v. Dempsey, 261 U.S. 86 (1923) 25

Miller v. Carter, 434 F.2d 824 (9th Cir. 1970), cert. den., 402 U.S. 972 (1970) 29

Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960) 21

Papachistou v. City of Jacksonville, 402 U.S. 156 (1972) 49

Parker v. Ross, 330 F. Supp. 13 (E.D. N.Y. 1971) 29

Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972) 25, 29, 34

Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. den., 395 U.S. 928 (1969) 38, 44

Salinger v. Loisel, 265 U.S. 224 (1924) 24, 30

Sanders v. United States, 373 U.S. 1 (1963) ..... passim

Simmons v. United States, 390 U.S. 377 (1967) 39, 40, 41, 42, 43

Smith v. Bennet, 365 U.S. 708 (1961) 34

Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969) 40, 43, 44

Stovall v. Denno, 388 U.S. 293 (1967) ..... passim

Thompson v. City of Louisville, 362 U.S. 199 (1960) 49
Townsend v. Sain, 372 U.S. 293 (1963) 35
United States ex rel. Anderson v. Mancusi, 413 F.2d 1012 (2d Cir. 1969) 42, 43, 44
United States ex rel. Garcia v. Follette, 417 F.2d 709 (2d Cir. 1969) 43, 44
United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970) 47, 48
United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969) 43
United States ex rel. Tyler v. Henderson, 322 F. Supp. 142 (E.D. La. 1971) 29
United States ex rel. Williams v. LaVallee, 415 F.2d 643 (2d Cir. 1969) 40
United States v. Davis, 399 F.2d 948 (2d Cir. 1968) 39
United States v. Kemper, 433 F.2d 1153 (D.C. Cir. 1970) 47
United States v. Mackey, 401 U.S. 667 (1971) 27
United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970) 40
United States v. Terry, 422 F.2d 704 (D.C. Cir. 1970) 47
United States v. Thompson, 417 F.2d 196 (4th Cir. 1969) 44
United States v. Venere, 416 F.2d 144 (5th Cir. 1969) 43
United States v. Wade, 388 U.S. 218 (1967) 3, 46
Wise v. United States, 383 F.2d 206 (D.C. Cir. 1967) . 38, 40, 44
Wong Doo v. United States, 265 U.S. 239 (1923) 30
Wong Sun v. United States, 371 U.S. 471 (1963) 49
Young v. United States, 407 F.2d 720 (D.C. Cir., 1969) 44

Statutes:

28 U.S.C. §2109 ..... 17, 25, 27, 28
28 U.S.C. §2243 31
28 U.S.C. §2244 ..... passim
28 U.S.C. §2255 33

Miscellaneous:

Criminal Investigation and Interrogation, Gerber and Schroeder ed., (1962) 41
Criminal Investigations, Jackson ed. (5th ed. 1962) 41
Developments in the Law–Res Judicata, 65 Harv. L. Rev. 818 (1952) 34
Note, 55 Minnesota Law Review 779 (1971) 46
Paul, Identification of Accused Persons, 12 Australian L.J. 42 (1938) 38
Sen. Rep. No. 1797, 89th Cong., 2d Sess. (1966) 27
Sokol, Federal Habeas Corpus (1969) 31
Wall, Eyewitness Identification in Criminal Cases 38
Webster's International Dictionary (2d Ed.) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-586

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary
Nashville, Tennessee,
Petitioner,

v.

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether this Court's equally-divided affirmance of a state court conviction constitutes an actual adjudication sufficient to foreclose relief by habeas corpus of respondent's claim that he was denied due process of law.

2. Whether the courts below erred in deciding that respondent's conviction must be set aside because it rests solely on evidence of an unreliable and unnecessary

"showup" identification which was obtained by means that suggested to the witness that respondent was the criminal.

STATEMENT

A. Introduction

Respondent, a 16 year old black youth, was indicted for the rape of Mrs. Margaret Beamer on October 1, 1965 and tried two months later (R. 1, 6).* Mrs. Beamer testified at trial that she had identified respondent Biggers at a police station "showup" at which he had been instructed to repeat the words spoken by the rapist seven months earlier: "You tell her to shut up or I'll kill you" (R. 10, 18). Her thirteen year old daughter testified to what she saw at the time of the crime but was unable to identify Biggers as the rapist (R. 83). Four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station[1] (R. 39, 48, 66, 75).

Biggers testified in his own behalf, denying that he committed the act charged. Biggers' mother, stepfather, and seven friends and neighbors testified that he was an obedient and truthful young man of good reputation who had never before been in "trouble" (R. 116-74).

---

* (R.) citations are to the printed record as prepared for use in this Court in 1968. (A.) citations are to the Appendix in the present case.

[1] At one point Biggers' counsel strenously objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled (R. 75, 76). "Mr. Williams: . . . it is immaterial, to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary your Honor." (R. 75)

In his summation, the prosecuting attorney told the jury that the case involved a single, overriding issue: identification (R. 177, 181). The jury found Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years (R. 4, 193-195). On appeal, the Supreme Court of Tennessee rejected *inter alia*, petitioner's claim that his identification was "so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom," 219 Tenn. 553, 411 S.W.2d 696 (1967). (R. 200, 204-06).

A petition for certiorari was granted by this Court and the judgment of the Supreme Court of Tennessee affirmed by an equally divided Court, 390 U.S. 404 (1968).[2] No opinion of the Court was published; however, Mr. Justice Douglas filed a dissent.

B. Proceedings In The District Court

On August 1, 1968, Biggers filed a petition for a writ of habeas corpus in the district court alleging that his conviction violated rights guaranteed by the Due Process Clause of the Fourteenth Amendment, in that he was presented for identification under impermissably suggestive circumstances, such as to give rise to a very substantial likelihood of irreparable misidentification. In addition to the "showup" identification procedure

---

[2] This Court heard argument and considered briefs with respect to whether Biggers' rights had been abridged in that (1) his identification violated the Due Process Clause under the totality of circumstances test adopted in *Stovall v. Denno*, 388 U.S. 293 (1967) and (2) the use *at trial* of words which Biggers was compelled to speak solely for the purposes of facilitating a pre-trial voice identification violated the Fifth Amendment as incorporated in the Fourteenth. The latter question had been reserved by the Court in *United States v. Wade*, 388 U.S. 218, at 223 (1967).

employed by the police, the following circumstances were alleged as supporting Biggers' claim that he was denied due process of law:[3]

(1) Mrs. Beamer's identification of petitioner was uncorroborated.

(2) Her thirteen year old daughter was unable to identify petitioner.

(3) Mrs. Beamer's opportunity to observe her assailant had been conceded by the State to have been "limited." She never saw him in direct light and could observe him for only 10 to 30 minutes.

(4) Petitioner was described to Mrs. Beamer as a "suspect" by the police.

(5) He was compelled to speak the inflammatory words used by the rapist without opportunity being afforded for comparison.

(6) The gap between the crime and the identification was seven months.

(7) The state treated the jury in a manner which substantially impaired its capacity to appraise the identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case; the jury was selected from persons exposed to this comment; the jurors were reminded of the harmful stories by the prosecution on *voir dire* and at trial;

---

[3]The petition for a writ of habeas corpus also alleged violations of Biggers' federal constitutional rights in that (1) his identification was obtained as a result of a pre-trial confrontation held subsequent to an unlawful arrest; (2) the state refused to defray the costs of a transcript of evidence despite Biggers' indigency; (3) the prosecuting attorney made inflammatory and prejudicial remarks in his summation to the jury; and (4) the totality of circumstances surrounding the conviction denied a fair trial.

police officers were permitted to testify again and again to the fact of identification although it was not controverted. Finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as appealing to racial prejudice and which that court found to be error, *albeit* non-reversible.

On August 6, 1968, the warden moved to dismiss the petition on the ground that Biggers' challenge to the identification procedure employed in his case had been "fully considered and decided adversely" by the Tennessee Supreme Court and by this Court (A. 17). After receiving briefs from the parties, the district court held that this Court "did not settle the merits of this case and affirmed only through an equal split in opinion" (A. 19) and denied the motion. On July 29, 1970, the district court decided that an "evidentiary hearing is required to determine the issue in this cause" (A. 31).

The evidentiary hearing was held on November 4, 1969. The court received into evidence affidavits from Biggers, his mother (Mrs. Flora Marie Hammonds), his counsel (attorney Avon N. Williams, Jr.) and heard oral testimony from several witnesses, including one qualified as an expert on the reliability of identification procedure.

In an opinion filed April 7, 1970, the district court concluded that the application for the writ should be granted. Biggers' conviction "was based almost exclusively" upon a stationhouse "showup" (or "one-on-one") identification procedure. The court concluded that "there is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial" (A. 34).

After reviewing the authorities, the court "looked carefully at the factual situation surrounding the showup to determine whether or not the procedure was conducted in such a manner as to violate due process requirements" (A. 39). On this basis the court discussed the facts surrounding the identification proceeding–as shown by both the state record and the evidentiary hearing–and concluded that the identification was conducted in a manner which "tended unnecessarily to maximize the possibility of misidentification."[4] The district court also rejected a claim by the warden that a lineup would not have been fair to Biggers:

> According to expert testimony produced by petitioner's attorneys, a line-up where no one had physical characteristics similar to petitioner would have been less preferable than one where members of the group had certain similar characteristics but,

---

[4] "The crime was seven months old, the victim was fully recovered and well, and there are no other indications that the ends of justice demanded an immediate showup rather than a much more reliable lineup. Furthermore, none of the other circumstances . . . [which] justify a showup existed in the instant case. The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect . . . the showup confrontation was not conducted near the time of the alleged crime, but rather, some seven months after its commission. Finally the witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant. The nature of the showup as conducted in this case–with the great lapse of time between the crime and the identification, the hesitancy of the witness in identifying the petitioner, the circumstances of the stationhouse confrontation coupled with Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant,–tended to maximize the possibility of misidentification of the petitioner" (A. 41-42).

in any event, would be preferable to a show-up. This conclusion is derived from the belief that any line-up would be a better test of the victim's memory since it would demand the exercise of some selectivity in identification. Furthermore, there is no indication that a truly concerted effort was made to produce suitable conditions for a line-up (A. 41).

On April 24, 1970, the warden filed a motion to reconsider, again urging that the court had no power to determine the issues presented by the petition because of this Court's affirmance. In an opinion, filed May 4, 1970, the district court again rejected this contention holding that: (1) the fact that Biggers' conviction was technically affirmed by reason of this Court's division did not bar relief since the merits of the constitutional claims were not actually adjudicated; (2) even if they had been adjudicated, under *Sanders v. United States*, 373 U.S. 1 (1962) those claims would still not have been automatically barred from consideration on habeas corpus; (3) as the instant petition was Biggers' initial federal habeas corpus petition, *res judicata* did not apply; and (4) under all the circumstances, it was in the interests of justice to reach the merits (A. 45-51).

C. Proceedings In The Court of Appeals

On appeal, the court of appeals reviewed the state record, and the transcript of the hearing before the district court and concluded that the district court's findings of fact were not clearly erroneous; that the court correctly applied the Due Process Clause to the facts found; and that Biggers was not barred from federal habeas relief by viture of this Court's 4-4 affirmance. The court of appeals agreed with the district court's reasoning relative to the effect of the 4-4 affirmance, and also set

forth an additional, ground for affirmance: that the district court had decided a different issue than the issue presented to this Court. The district court did not consider the effect of voice identification on the reliability of the identification, whereas this Court—based on the question presented to it on certiorari—may have relied "solely on the voice identification issue" presented by the application for certiorari." 448 F.2d 91, 96. Judge Brooks dissented, concluding that the petition for a writ of habeas corpus was barred because this Court had finally adjudicated the constitutionality of the identification. Judge Brooks conceded, however, that if the district court were authorized to reach the merits its decision to grant the writ was not erroneous, 448 F.2d at 95, 99.

D. The Facts Surrounding The Biggers Arrest, Identification, And Trial

On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife, the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor (R. 9, 10). Mrs. Beamer's attention was drawn to the attacker's knife, but she later said that the rapist was large, had a youthful voice, soft skin, and "sort of bushy" hair (R. 14, 17, 18, 50). The state record does not show whether Mrs. Beamer reported these characteristics to the police immediately following the crime—only that she testified at trial to identifying petitioner on the basis of them at a police station "showup" seven months later (R. 14, 17). After hearing Mrs. Beamer describe what she had told the police (A. 125), the district court found that she

"could give only a very general description of her assailant" (A. 33).

Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway (R. 83). She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom (R. 90, 91). The intruder then took Mrs. Beamer out of the house through an unlit kitchen to a nearby patch of woods where he raped her. The events surrounding the crime lasted some 10 to 30 minutes (R. 26, 85).

Seven months later, on August 17, 1965, Biggers was arrested for loitering while he was receiving treatment at a Nashville hospital at 1:30 a.m. for several cuts and bruises. His mother was present. After his arrest,[5] Biggers was lodged in a juvenile detention facility. Later he was transferred to the custody of the police department in order to be confronted by Mrs. Beamer.

---

[5]An August 17th edition of the Nashville Tennessean, a morning newspaper, carried a front page story of an assault that took place earlier in the evening and Biggers' arrest (R. 196). Biggers, although not named, was described as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents; and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of Biggers entering jail and stated that he had confessed to attacking the white woman, Mrs. Carrie Silverman; that Mrs. Beamer had identified him as her attacker; and that two other attempted rape victims could not identify him. Biggers' mother was said to have retained an attorney soon after he was arrested (R. 196, 46, 47). At the State trial, the State initiated reference to newspapers accounts of Biggers' arrest in order to establish that Mrs. Beamer had identified Biggers before his photograph appeared on August 18th (R. 17).

On the morning of Biggers' arrest the police went to Mrs. Beamer's home and brought her to the police station—as an officer told her—to "look at the suspect" (R. 24, 25, 39, 65, 77, 78). The police brought Biggers into the doorway of one of the rooms in the detective division in which the prosecutrix was seated (R. 40, 66, 80). The record made in the state courts reveals that Mrs. Beamer saw Biggers in the doorway in the presence of "quite a few"—at least five—policemen (R. 39, 48, 65, 73, 79). Neither his parents nor attorney were present or had been notified of the identification. Mrs. Beamer asked the police to have Biggers speak and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you" or similar words (R. 18, 66, 68, 69, 78, 79). According to her trial testimony, only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her (R. 17), and the district court found that "the 'first thing' that made her think he might be her assailant was his voice" (A. 34).[7]

The district court received additional evidence with respect to the character of the pre-trial identification and why this method of identification was used in the instant

---

[6]One officer present testified that Mrs. Beamer identified Biggers before he spoke (R. 80), but Mrs. Beamer herself stated reliance on his voice for identification (R. 17). Another officer and petitioner also testified that she requested him to speak prior to naming him as the rapist (R. 66, 107, 108).

[7]In the district court, Mrs. Beamer testified that she had identified him before he was compelled to speak but she also conceded that she was more certain of his identity after he spoke (A. 129).

case. Biggers described how while on his way home in the evening of August 16, 1965, he was attacked by dogs at 18th and Scovel Streets in Nashville and cut his arm while trying to elude them. When he reached home, he was taken to the Hubbard Hospital by his mother and while receiving medical attention was accosted by policemen who questioned him about his injury. He was then taken to the Bordeaux area of Nashville where he was submitted alone to a Mrs. Silverman for identification. According to Biggers, after Mrs. Silverman could not identify him, he was taken first to the juvenile detention facility and at about 7:30 a.m., after being questioned by police, to the Metropolitan Police Headquarters where he was placed in a cell. Later that day he was submitted alone to Mrs. Margaret Beamer for identification. This evidence was not contradicted by the state (A. 29-30).

Biggers' mother described her son's return home with his injury and how she took him to a hospital. While receiving treatment, a detective asked permission to take the boy to the place where he had fallen, and she consented after extracting the detective's promise to bring him home immediately. When Biggers had not been returned home and she was unable to learn more about the case by telephone–at about 2:00 or 3:00 a.m.–she went to the juvenile court building and found that her son was in custody. She unsuccessfully sought his release from the police. After other unavailing efforts to obtain his release, she retained an attorney. The attorney later told her that he had been informed that she could obtain her son's release because he was only held for loitering. However, sometime in the late morning or early afternoon of the 17th of August, she was told by the police

that Biggers had been identified as a rapist. This evidence was not controverted by the state (A. 26-28).

Attorney Williams, one of the counsel of record for respondent, stated that he had examined his Juvenile Court record and that it stated, Biggers was "arrested at 5:25 a.m., 8-17-65 on a technical charge of loitering, issued from the Juvenile Court." This evidence was not controverted by the state (A. 24-25).

Captain William McDaniel of the Nashville Police Department, one of the officers who had conducted the 1965 investigation of the crime for which Biggers was convicted, testified at the hearing that a lineup was recognized as the fairest and most reliable police procedure to ascertain the identity of a criminal (A. 68, 72), but that a lineup had not been held in Biggers' case because persons who combined both his size and age could not be found in custody (A. 71, 72). He conceded that there were two jail facilities in Nashville lodging at least one hundred persons, but it was his belief that no inmate combined all of Biggers' physical traits (A. 68, 69). He did not make any attempt to find citizens who would participate in a lineup (A. 75); nor were inmates sought from the Tennessee State Penitentiary which is located in Nashville (A. 69). The district court concluded that the police did not make a satisfactory attempt to arrange a lineup (A. 41).

Captain McDaniel set the time of the "one-on-one" or "showup" confrontation between Biggers and Mrs. Beamer at noon or early afternoon on August 17, 1965 (A. 72). He testified that Biggers had been arrested at the Hubbard Hospital the previous night at about 11:30 p.m., while he was receiving medical treatment and candidly conceded that petitioner had been arrested on the basis

of a "technical" charge and that there was no evidence of loitering (A. 76).

Regarding the identification proceeding itself, he testified that Mrs. Beamer had identified Biggers while he was in the custody of the two officers who had brought her to the station house. Biggers was required to stand in front of an open door in the presence of the officers. She then had stated that he was the criminal (A.80). Immediately thereafter, she had asked that he speak and he was told to say the words used by the rapist, "Shut up or I'll kill you." After he spoke these words, she confirmed the identification (A. 81). McDaniel also testified that Mrs. Beamer had viewed a number of suspects both at police headquarters and at her home, in person and by photograph, during the 7 months prior to petitioner's arrest. She had been cooperative and was continuously available if the police wanted to speak to her during this period (A. 83).

Mrs. Beamer also testified at the hearing. She described some of the events surrounding the crime, and how she had identified Biggers at police headquarters as he stood in an open doorway. She said she then had asked that he speak the words used by the rapist, "Shut up or I'll kill you." (A. 124). After hearing him speak, she had felt more confident of her identification. Although she conceded the dim lighting conditions at the time of the crime, she testified there was no doubt in her mind that Biggers was the criminal (A. 125, 127). In the months after the crime Mrs. Beamer had been asked to identify several suspects, some of whom had been brought individually to her home for "one-on-one" identification while other were presented to her in lineups of "four or five men" at police headquarters (A. 124, 130).

Detective Bailey of the Nashville Police Department briefly described the identification procedure in this case and generally corroborated the testimony of Captain McDaniel and Mrs. Beamer as to the manner in which Biggers had been presented for identification (A. 134).

Dr. Irwin Pollack of the University of Michigan testified as to the reliability of the identification procedures employed by the police. Dr. Pollack concluded that the procedures used in Biggers' identification had prejudiced an unbiased indentification and suggested to Mrs. Beamer that Biggers was guilty (A. 92, 93).[8] He identified several factors which led him to this conclusion.

First. He placed great emphasis on the fact that a "yes-no", as he called it, procedure such as a "one-on-one" or "showup" identification did not test the witnesses' ability to make a selective judgment. If the person presented for identification is similar in appearance to the criminal, procedures which do not require picking one person out of a group have an inherent tendency to suggest he is the guilty one (A. 93, 94).

Second. He characterized reliance on voice identification as an extremely unreliable identification procedure especially when (a) the words spoken had

---

[8]Dr. Pollack stated that he did not in any sense mean his testimony to be a comment on the reliability of Mrs. Beamer as an individual, but rather restricted his criticism to the prejudicial character of the procedures employed by the police (A. 109). He agreed that Mrs. Beamer's failure to identify the first person she was shown supported the conclusion that those procedures did not absolutely compel her to identify petitioner, but he concluded that her failure to identify others had to be weighed along with the prejudicial nature of the identification procedures employed, the seven month delay, and the poor lighting conditions under which the rapist was initially observed (A. 112).

emotional connotation (A. 93), and (b) there was no opportunity for comparison of voices (A. 98).

Third. He believed that certain other circumstances present in the record of trial aggravated the prejudice already caused by the "one-on-one" or "showup" identification procedure and the reliance on voice identification. He mentioned, specifically: (a) the seven month gap between the crime and the identification (A. 95, 101); (b) the poor opportunity for initial observation of the criminal caused by the lighting conditions prevailing at the time of the crime (A. 116); and (c) the fact that Biggers had been described to Mrs. Beamer as a "suspect" prior to being presented for identification (A. 99, 101).

Dr. Pollack also agreed with several statements in a treatise and judicial opinions to the effect that the general fallibility of human perception and memory make extremely prejudicial identification procedures that aggravate difficulties encountered in recalling past events (A. 99). He took the position that even a lineup in which there were differences between the participants, but also some similarities, was a superior identification device to a "showup" (A. 118). The district court expressly relied on this testimony (A. 41).

Even if Mrs. Beamer had not identified Biggers by his voice, Dr. Pollack still maintained that the procedures used were unsatisfactory (A. 98).[9] "My opinion with

---

[9]Dr. Pollack characterized voice identification as being an extremely unreliable identification procedure because there are so few cues available to the complainant (A. 97). He thought that the seven month time lapse may have had a serious effect on the reliability of the voice identification:

respect to such factors as the length of time between the act and the identification, the one-on-one confrontation, the identification of the particular individual as a suspect, all of these might lead the complainant to identify a particular person under these circumstances." (A. 101). He explained that he had concluded from reading the transcript of the statement that the primary mode of identification was auditory, but that even if the identification was purely visual, his opinion remained that the identification procedures employed were unduly suggestive (A. 105).

SUMMARY OF ARGUMENT

I

This Court's equally divided affirmance of respondent's state court conviction does not foreclose collateral federal relief by habeas corpus. A uniform line of cases establishes that an equally-divided affirmance merely ends the process of direct review but settles no issues of law. The policies denying precedential status to such affirmances apply as logically to respondent's habeas corpus petition as to other litigants.

The only possible limitation on the district court's power to grant the writ is 28 U.S.C. § 2244(c), but the statute's prohibition of claims "actually adjudicated" does not

---

"I'm concerned that in effect the subject's auditory memory of what was said changes with time. . . . Our subjective memory of a particular auditory event does indeed decay with time so if you ask me what is it about the voice that relates to this long-term memory, it's the impermanence, if you will, of the mental copy of what was said, . . . and we know from experiments that the fallibilities of identification will indeed increase with time." (A. 96)

reach an affirmance necessitated by equal division. The questions of law presented to this Court in 1968 were not decided; the judgment in respondent's case was affirmed by operation of a technical rule of necessity. The legislative history surrounding §2244(c) bears not the slightest suggestion that Congress considered equally-divided affirmances tantamount to actual adjudication. 28 U.S.C. §2109 draws a parrallel between equally-divided dispositions and the administrative affirmances made of necessity when the Court lacks a quorum. In both situations, the Court disposes of a case on direct review but does not actually adjudicate questions of law or fact.

Other considerations present in this case re-enforce the conclusion that the full federal adjudication below was in order. This was an initial habeas corpus petition; no question of abuse of the writ is present. The absence of an opinion from this Court left in doubt which of respondent's arguments produced the division, and the fuller record made at the habeas hearing provided bases for relief not apparent on direct appeal. The opportunity, inherent in habeas, to make a full and searching re-evaluation of the circumstances of respondent's claim of a denial of due process of law was properly taken by the district court.

II

The courts below correctly applied the Due Process Clause to the facts of this case. The state trial turned on the question of identification. The sole evidence connecting respondent with the crime was the complaining witness's report of a "showup" held seven months after the event, at which respondent had been displayed to her

as a "suspect." She did not finally identify the defendant until after a "voice test" at which he alone spoke the inflammatory words used by the attacker; the district court found that she failed to identify him at trial; and the other witness to the crime could not identify him altogether.

A one-man "showup" is inherently suggestive, and its operation in the present case made it more so. Nonetheless, such identifications may be constitutional under certain circumstances; but this case involved none of them. There was nothing analogous to a compelling necessity as in *Stovall v. Denno*, 388 U.S. 293 (1967). Seven months after the crime a hurried "showup" was not crucial to an ongoing police investigation; the police in this case had full opportunity to assemble a lineup, a procedure they conceded to be more reliable. The omission of a lineup was not excused by external guarantees that the identification was reliable. The complaining witness had no good or sustained opportunity to observe her attacker; the inflammatory effect of the "voice test" deprived the proceedings of trustworthiness; the time lapse between event and identification deepened the unreliability; and there was no other evidence at all implicating the defendant. The further fact that the respondent's production at the "showup" was the result of a patently illegal arrest contributes to the invalidity of his conviction.

ARGUMENT

I

THE AFFIRMANCE BY THIS COURT OF RESPONDENT'S CONVICTION BY AN EQUALLY DIVIDED COURT DID NOT FORECLOSE CONSIDERATION OF THE MERITS OF HIS CLAIM OF DENIAL OF DUE PROCESS OF LAW BY PETITION FOR A WRIT OF HABEAS CORPUS.

Petitioner urges that this Court's equally divided affirmance of Biggers' state conviction for rape, 390 U.S. 404 (1968), not only concluded adjudication of Biggers' constitutional claim of denial of due process on direct review, but also operated as an absolute bar to subsequent litigation of his claim in a federal habeas corpus court. Such a result, however, would be inconsistent with the policy behind denying precedential status to such affirmances, contrary to settled principles governing access to federal habeas corpus relief, productive of confusion, and, as this case strikingly shows, capable of causing gross injustice. It would, we submit, exalt form over substance, contrary to the very essence of habeas corpus as a remedial device which, in Justice Holmes' celebrated words, "cuts through all forms and goes to the very tissue of the structure," *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion).

This Court has never treated an equally divided affirmance as entitled to such weight as could bar litigation of a claim otherwise cognizable on habeas corpus. To do so would be inconsistent with the nature of an equally divided affirmance as a long line of decisions has characterized it. In *Etting v. Bank of United States*, 24 U.S. (11 Wheat.) 59, 77 (1826), for example, the Court made no attempt to analyze the cases cited to

it or to decide their application "because the judges are divided respecting it. Consequently, *the principles of law* which have been argued *cannot be settled;* but the judgment is affirmed, the court being divided in opinion upon it." (Emphasis added.) No decision of the Court since *Etting* suggests that such an affirmance is sufficiently conclusive to settle the merits of a case. To the contrary, affirmance by an equal division has been repeatedly characterized as a technical affirmance of the judgment below for lack of sufficient votes to do anything else rather than a determination on the merits:

> . . . no affirmative action can be had in a cause where the judges are equally divided in opinion. . . . If the affirmative action sought is to set aside . . . an existing judgment . . . the division operates as a denial of the application, and the judgment . . . stands in full force. . . . If the judges are divided, the reversal cannot be had, for no order can be made . . . . It is, indeed, the settled practice in such cases to enter a judgment of affirmance; but that is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below. . . . The legal effect would be the same if the appeal, or writ of error, were dismissed. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110, 112 (1868).

The technical, indeed automatic, operation of an equally divided affirmance is demonstrated by the language of two cases over a hundred years apart. In the *Albany Bridge Case*, 69 U.S. (2 Wall.) 403 (1864), the Court stated that ". . . the Court being equally divided, no opinion on any point was given and the decree so stood *a decree affirmed of necessity.*" (emphasis

supplied). More recently, a per curiam opinion in *Anderson v. Johnson*, 390 U.S. 456 (1968), stated: "Four members of this Court would reverse; four members of this Court would dismiss the writ as improvidently granted. *Consequently, the judgment of the United States Court of Appeals for the 6th Circuit remains in effect*" (emphasis supplied).[10] An equally divided affirmance, therefore, is a judgment routinely entered to close out a case in which the Court can do nothing else. It does not place this Court's imprimatur or the decision of a state court. That decision stands unaffected because it is unreviewed.[11]

Despite the fact that no decision has been rendered on the merits of Biggers' claims sufficient to be considered

[10] The difference between a decision on the merits and technical affirmance of a judgment is well stated in *Lambros v. Young*, 145 F.2d 341, 343 (D.C. Cir. 1944):

> A *decision* involves reaching a conclusion. Where no conclusion is reached, nothing is decided. Even in judicial proceedings the action of a divided court is not a *decision*. It does not affirm the *decision* of the court below. Instead it affirms the *order* or *judgment* or *decree* of the court below. This is not because the appellate court has decided the case. It is, rather, because the appellate court has been unable to decide the case and therefore cannot reverse the lower court's judgment or decree. But this kind of affirmance is not a decision on the facts or law. (Emphasis in original.)

[11] In *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960), criminal charges had been brought against the appellant for failing to admit inspectors to his home. A separate opinion by Justice Brennan, Warren, Black and Douglas stated:

> Four of the Justices participating are of the opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent. . . . In such circumstances . . . the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled.

See also *Hertz v. Woodman*, 218 U.S. 205, 213 (1910).

precedent, the warden argues that an affirmance by an equally divided court amounts to a conclusive adjudication of the questions of law and fact presented to the Court so that Biggers cannot raise in a federal habeas corpus proceeding the critical factual and legal issues on which any other state prisoner would be heard.

Respondent concedes that affirmance by an equally divided court is a final adjudication to the extent that it marks the end of direct review . It is not, however, a precedent with *stare decisis* effect. This conclusion follows inescapably from the fact that a 4-4 affirmance takes its character solely from the character of the judgement of the court below.[12] If such an affirmance cannot be taken as settling a principle of law, it cannot be considered a bar to issuance of the writ of habeas corpus. The policy behind withholding precedential status is based on, at least, two considerations: (1) that a majority of the sitting Justices of this Court have not agreed on a result and (2) that it would be confusing, and potentially mischievous, for lower courts to have to scrutinize a decision by this Court—one that is conventionally

---

[12] In a civil case, affirmance of a lower court decision merely refuses to open a door that had already been closed by the lower court. But an equally divided affirmance by this Court of a state criminal conviction goes a step beyond that, petitioner argues and closes off federal habeas corpus. But the Supreme Court of Tennessee could not have closed that route to Biggers, so if habeas is unavailable it must be due to the positive action of this Court. Yet to say that such a result follows from a 4-4 decision is almost a contradiction in terms. The essence of a 4-4 affirmance is the Court's passivity and acquiescence because it is incapable of taking action. As Justice Field said in *Durant, supra*, 74 U.S. at 110,

> no affirmative action can be had in a cause where the judges are equally divided in opinion.

reached without opinion—in order to determine what has been settled. Both considerations apply as much to the litigant whose conviction was fortuitously affirmed as they do to future litigants.[13]

In conventional civil litigation affirmance by an equally divided court marks the end of litigation only because affirmance ends the process of direct review. Collateral remedies are not generally available. But where collateral attack through habeas corpus, an independent, separate proceeding has been made available by Congress, there is no reason to distinguish among litigants raising the same constitutional claim because some raised that claim in this Court—unless, of course, this Court authoritatively resolved the legal issue. When a man's liberty hangs in the balance: "... the protection ... from

---

[13]As an alternative ground for affirmance the majority of the court of appeals also thought that the issue presented to this Court on certiorari from the Supreme Court of Tennessee was not the same question considered by the district court on petition for writ of habeas corpus. In short, the court of appeals seemed to believe that this Court may have denied relief to Biggers because some members of the Court only considered the voice identification issue, separately briefed and argued to the Court, and did not pass on the issue as posed by the district court. Whether or not the court of appeals was correct in this regard, its conclusion demonstrates the potential confusion of the result sought by petitioner in this case, for that result puts lower courts to the delicate and difficult task of determining issues adjudicated by this Court without the benefit of an opinion of the Court. Cf. *Epton v. Nenna*, 446 F.2d 363 (2d Cir. 1971).

unconstitutional interference, which is the subject of inquiry in these [habeas corpus] proceedings, overrides the less important interest of finalizing litigation." *Sanders v. United States*, 373 U.S. at 1, 7-8; *Fay v. Noia*, 372 U.S. 391, 423; *Salinger v. Loisel*, 265 U.S. 224, 230-31 (1924).

There should, therefore, be no difficulty in distinguishing between finality in the sense of giving effect to the judgment of a court below in order—*ex necissitate*—to bring the process of direct review to a close, and finality in the sense of uttering the last, decisive, word on the legal merits of a dispute over unconstitutional detention. It would be a gross injustice to deny any remedy to a man imprisoned for 20 years in violation of the Due Process Clause on the basis of a judgment so tenuous that it settled no principle of law and laid down no precedent. The injustice here is magnified by the fact that if Biggers had proceeded directly to a federal habeas court, his right to petition for the writ would be unquestioned. To bar habeas relief to this one prisoner alone would be to give free reign to an element of chance in a process where chance has no place.

The Court is confronted in this case with a record made on federal habeas corpus that dramatically demonstrates the mischief that petitioner's submission would produce. The district court held a hearing, received material evidence, and decided that the evidence established a denial of due process under the totality of the circumstances doctrine. If a 4-4 affirmance of a due process claim bars federal habeas corpus, such a rule

operates to foreclose opportunity to present supplemental facts—not before the courts on direct review—even though they make out a claim of fundamental unfairness. This result cannot be squared with the historic office of the federal habeas corpus jurisdiction, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923).

The highly formal nature of an affirmance by simply virtue of there not having been a majority of Justices who would vote for reversal, combined with the absence of an opinion of the court, strongly suggests that the Court's action should be compared to, and given no more weight than, a denial of certiorari. A denial of certiorari is, of course, without substantive significance for subsequent habeas corpus proceedings. *Fay v. Noia*, 372 U.S. 391 (1963). See also *Miller v. Carter*, 434 F.2d 824, 826 (9th Cir. 1970), *cert. den.*, 402 U.S. 972 (1970); *Radich v. Criminal Court*, 459 F.2d 745 (2nd Cir. 1972) (*certiorari pending sub nom. Ross v. Radich*, (O.T. 1971, No. 71-1510).

Congress has recognized that an affirmance by an equally divided court is nothing more than a *pro forma* disposition. The statute governing disposition of cases by this Court in the absence of a quorum, 28 U.S.C. §2109, explicitly equates lack of a quorum with an affirmance by an equally divided court:

> In any other case brought to the Supreme Court for review [all cases except those which involve direct appeal from a district court], which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the

> judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.* (Emphasis added)

But a court without a quorum cannot consider or decide any case before it for a quorum is the number "legally competent to transact business." (Webster's International Dictionary, 2d Ed. 2046.) Hence the statute merely provides for an acquiescence in the result reached by the lower court. Obviously Congress believed that this Court's decisions gave an affirmance by an equally divided court no more effect than that.

Petitioner argues that 28 U.S.C. §2244(c) dealing with the finality of determinations by federal courts in habeas corpus proceedings barred consideration of the petition for a writ of habeas corpus. This statute prohibits reconsideration of claims "actually adjudicated" by this Court except when material and controlling facts could not have been presented previously. As an "actual adjudication" establishes a precedent which is binding upon federal courts, under Section § 2244(c) habeas corpus petitions raising issues which have already been decided adversely to the petitioner must be dismissed.

The legislative history of §2244(c), however, reveals no intention to deal with the effect of equally divided affirmances; only an intention on the part of Congress to eliminate repetitive and frivolous habeas corpus writs, which were clogging the calendars[14] of federal courts,

[14]It should be noted that in entertaining habeas corpus petitions challenging a criminal conviction after a divided affirmance in the Supreme Court, the federal district courts would not subject themselves to a flood of new litigation. Divided affirmances in the Supreme Court are rare, and divided affirmances in criminal matters are rarer still.

without unconstitutionally suspending the writ.[15] According to Judge Orie Phillips, Chairman of the pertinent Judicial Conference Committee, the purpose of the 1966 Amendments were "to prevent the abuse of the writ of habeas corpus by persons in custody under judgments of state courts in habeas corpus proceeding in Federal courts, and to expedite the disposition of non-meritorious and repetitious applications for the writ in Federal courts by State prisoners." Sen. Rep. No. 1797, 89th Cong., 2d Sess., 4 (1966).

The intent of Congress in passing §2244(c) would appear, therefore, to have been to ease the administrative burden of federal courts, without depriving state prisoners of their established right to habeas corpus review of their convictions, by screening out plainly repetitious and non-meritorious habeas corpus suits through an extremely narrow application of principles of finality to those actual determinations of fact and law made after actual consideration of the merits.[16]

In light of 28 U.S.C. § 2109, it does not seem likely that Congress intended that an affirmance by an equally divided court would have any limiting effect on a

---

[15] See Sen. Rep. No. 1797, 89th Cong., 2d Sess. 2, 6 (1966). The Judiciary Committee of the House of Representatives concurred in this opinion:

> It is the opinion of your committee that the bill . . . provides adequate remedies by habeas corpus to state prisoners and thereby safeguards the constitutional rights of such prisoners. H. Rep. No. 1892, 89th Cong., 2d Sess. 9 (1966).

[16] In his concurring opinion in *United States v. Mackey*, 401 U.S. 668, 687 n. 5 (1971), Justice Harlan considered the "sparse" legislative history of the statute and concluded, *inter alia*, that where due process claims were at issue, even the narrow application of finality principles provided by § 2244(c) might be inappropriate.

subsequent federal habeas corpus action. If it were otherwise, then an affirmance because of the lack of a quorum would also come within the limits of 28 U.S.C. §2244(c) even though a court with a quorum is incapable of undertaking even consideration of a case. Neither sort of affirmance fits the statutory concept of a case "actually adjudicated"—a concept by which Congress seems plainly to have recognized that preclusion from habeas corpus is justifiable only when there has already been a determination of a federal question by a federal court, notably this Court. To the extent that the issue involved here is a matter of statutory interpretation of 28 U.S.C. § 2244(c), it is particularly relevant that Congress, as shown by 28 U.S.C. § 2109, considers an affirmance by an equally divided court to be a procedural disposition and not an actual adjudication of a case before this Court.

With respect to direct appeals from district courts, 28 U.S.C. §2109 also provides that, if this Court lacks a quorum, the Chief Justice

> may order it [the case] remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court. . . .

This statute evinces a Congressional aim that federal appellate review not be precluded by an internal disability of this Court, especially one over which the parties have no control. Like a court which lacks a quorum, an equally divided court is a hamstrung body which cannot decide the issue in the case before it. *Etting v. Bank of the United States*, 24 U.S. (11 Wheat.) 59 (1826). Fortunately, in criminal cases where this Court is equally divided, habeas corpus provides an analogous and singularly appropriate way to have those issues resolved

by a federal forum. Because this procedure provides federal resolution of issues which this Court had left undecided, resort to it in these circumstances should clearly be approved.

Those courts that have been called upon to rule on cases involving the 1966 amendments to § 2244 have invariably construed them in a fashion inconsistent with petitioner's argument here. In *McDowell v. Ciccone*, 275 F. Supp. 957, (D.C. Mo. 1967), *aff'd* 407 F.2d 257, the court held *res judicata* principles inapplicable as a basis for barring habeas corpus relief sought after a denial of a motion to vacate sentence. In *Miller v. Carter*, 434 F.2d 824 (9th Cir.) *cert. denied*, 402 U.S. 972 (1970), the court of appeals held that by enacting § 2244(c) "Congress intended to give a conclusive presumption only to actual adjudications" and that dismissing the writ without opinion did not constitute an actual adjudication. In *United States ex rel. Tyler v. Henderson*, 322 F. Supp. 142 (E.D. La. 1971), the district court stated that the "doctrine of *res judicata* has no place in habeas corpus proceedings, especially where there is reason to reappraise either the facts or the law in order to do substantial justice. This rule applies equally to appropriate cases where a writ has been granted as well as those wherein a writ was denied." In *Epton v. Nenna*, 318 F. Supp. 899 (S.D. N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir., 1971), the court held a dismissal of an appeal an adjudication on the merits, but, significantly, the decision to dismiss was reached by a majority of this Court. In *Parker v. Ross*, 330 F. Supp. 13 (E.D. N.Y. 1971), it was held that this Court's affirmance of a state appellate court based on an adequate state law ground of decision was not an "actual adjudication" of the issue. The court in *Radich v. Criminal Court, supra*, agreed with the decision of the Sixth Circuit and the district court in this case.

In any event, § 2244(c) does not apply to Biggers' habeas corpus petition because the district court received evidence not before this Court or the state courts on direct review. The statute itself provides that the admission of new material facts is a circumstance sufficient to permit a habeas court to grant relief. In this case, the additional evidence received also changed the character of the legal issue before the district court for that court applied a due process totality of the circumstances test to circumstances which were not developed in the state court record. Significantly, the district court expressly relied on this new evidence in its opinion granting relief. There are, however, additional considerations supporting a construction of 28 U.S.C. §2244(c) that does not restrict the jurisdiction of a federal habeas corpus court subsequent to an equally divided affirmance by this Court.

First. This Court has stated explicitly and repeatedly that the doctrine of *res judicata* is inapplicable to habeas corpus proceeding. *Salinger v. Loisel*, 265 U.S. 224, 230 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924). In *Fay v. Noia* (372 U.S. at 422-424), it was said that the inapplicability of *res judicata* "stems from the very nature of the writ." And the principle was restated with force in *Sanders v. United States*, 373 U.S., at 7-8.[17]

---

[17] "At common law, the denial by a court or judge of an application for habeas corpus was not res judicata. . . . That this was a principle of our law of habeas corpus as well as the English law was assumed to be the case from the earliest days of federal habeas corpus jurisdiction. . . . Since then, it has been settled in an unbroken line of decisions . . . [citations] . . . Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia*, 372 U.S. at 402, access to

Since the remedy of habeas corpus is "an original civil remedy for the enforcement of the right to personal liberty," *Fay v. Noia* (372 U.S. at 423), and involves a separate proceeding to challenge detention that does not conform to fundamental requirements of law, the "very nature of the writ" does not easily admit to restrictions based solely on the circumstances of the judgment rendered upon review. Habeas does not revise that judgment or depend upon it; rather it acts upon the present status of the petitioner's detention.

Second. It is well established that successive petitions for habeas corpus are not barred by the doctrine of *res judicata*, *Sanders v. United States*, *supra*. "Indeed, some courts have allowed successive petitions even when dismissal would be justified. This kind of fair-minded leniency is in full accord with the tradition of the writ," SOKOL, FEDERAL HABEAS CORPUS 192 (1969). If successive petitions for the writ are not barred by *res judicata*, *a fortiori*, a petition for habeas corpus ought not to be prohibited when the only consideration of the constitutional claim on direct review resulted in a divided affirmance. There is, moreover, no question of abuse of the writ in such a context (cf. *Sanders*, *supra*, at 373 U.S. 12) and it was abuse that Congress was concerned with when it enacted § 2244(c).

Third. The federal habeas jurisdiction empowers a district court to "dispose of the matter as law and justice require," 28 U.S.C. §2243. Biggers' claim of a violation of due process was of such magnitude that principles of prospectivity do not apply to it, *Stovall v. Denno*, 388

---

the courts on habeas must not be thus impeded. *The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.*" (Emphasis added.)

U.S. 293 (1967). The district court expressly found that "it would amount to a travesty on justice" (A. 47) not to entertain and to grant the petition. Nothing in the legislative history of 28 U.S.C. §2244(c) reveals an attempt to restrict district court discretion in this regard.

Fourth. The right to the writ of habeas corpus stems from the Constitution itself[18] and a construction of 28 U.S.C. §2244(c), that foreclosed a prisoner's first opportunity to obtain the writ—despite his assertion of a valid claim of denial of due process—would raise grave constitutional doubts. In *Jones v. Cunningham*, 371 U.S. 236, 238 (1963), the court observed that "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas be made available." The constitutional roots of habeas corpus is a recurring theme in the *Fay* and *Sanders* decisions.[19]

---

[18]Article 1, §9, cl. 2: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion if the public safety may require it."

[19]The principle stated in *Fay v. Noia, supra*, that "... conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary, federal judicial review," (372 U.S. at 424), clearly implicates Article 1, §9, cl. 2:

> We need not pause to consider whether it was the Farmers' understanding that congressional refusal to permit the federal courts to accord the writ its full common law scope as we have described it might constitute an unconstitutional suspension of the privileges of the writ. There have been some intimations of support for such a proposition in decisions of this Court ... [T]he Constitution invites, if it does not compel ... a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice. (*Id.* at 400-406.)

The constitutional basis of habeas corpus received its most explicit formulation in *Sanders v. United States, supra*, where the court held that the then existing language of 28 U.S.C. § 2244, dealing with successive habeas corpus petitions, "plainly was not intended to change the law as judicially evolved . . . [L]anguage in the original bill which would have injected *res judicata* into federal habeas corpus was deliberately eliminated. . . . Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus . . . § 2244 might raise serious constitutional questions," (373 U.S. at 11).

In discussing 28 U.S.C. § 2255, which contains a parallel provision to § 2244 for successive motions to vacate sentence, the opinion of the Court warned:

> . . . this language might seem to empower the sentencing court to apply res judicata virtually at will . . . . But the language cannot be taken literally. In *United States v. Hayman*, 342 U.S. 205 . . . [t]he Court avoided the constitutional question by holding that § 2255 was as broad as habeas corpus. . . . Plainly, were the prisoner invoking § 2255 faced with the bar of res judicata, he would not enjoy the "same rights" as the habeas corpus applicant. . . . Indeed, if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered. (*Id.* at 13-14.)

Even the dissent in *Sanders* conceded that "strict doctrine of *res judicata* do not apply in this field. The consequences of injustice—loss of liberty and sometimes loss of life—are far too great. . ."

Fifth. Habeas corpus, in light of its basic nature and role, has been liberally construed and kept unhampered by procedural niceties of the sort contended for by petitioner in this case. Like the precious rights of the First Amendment, the writ too needs "breathing space" if it is to function effectively. In *Darr v. Burford*, 339 U.S. 200, 203-204 (1950), for example the court stressed that a "favorable attitude toward procedural difficulties" accorded with the scope of federal habeas corpus and observed that "federal courts have long disregarded legalistic requirements in examining applications for the writ." See also *Smith v. Bennet*, 365 U.S. 708, 712 (1961): "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution."[20]

We submit, therefore, that both policies and principles which have guided this Court's supervision of the federal habeas corpus jurisdiction compel consideration of Biggers' claim that he was denied due process of law. "[T]echnical rules whose primary purpose lies in the area of civil litigation," as the dissent in *Sanders* (*Id.* at 24) characterized the rules of *res judicata*, should not control. Rules designed to assure finality in civil litigation simply do not apply to a petition seeking release from unconstitutional detention for such cases have "always stood on a different footing." *Radich v. Criminal Court, supra*, 459 F.2d at 751.

---

[20] Since "the objective of conclusiveness of judgments must be qualified by the desire for fundamental fairness . . . [s]ince the writ is an extraordinary remedy designed to safeguard individual liberties and since the interests protected by res judicata are not paramount . . . . rigid adherence to principles of res judicata would considerably reduce the protection which [the] proceedings are intended to afford," *Developments in the Law–Res Judicata*, 65 Harv. L. Rev. 818, 851, 878 (1952).

II

THE COURTS BELOW CORRECTLY DECIDED THAT THE PRE-TRIAL IDENTIFICATION PROCEEDING SHOWN BY THE RECORD IN THIS CASE VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Examination of the full circumstances now shown to surround Biggers' pre-trial identification persuaded both the district court and the court of appeals that Biggers was the victim of an overly suggestive, highly prejudicial, and totally unnecessary "showup" identification. Consistent with its obligation under *Townsend v. Sain*, 372 U.S. 293 (1963), the district court found that "an evidentiary hearing is required to determine the factual issues." (A. 20) The court, therefore, received supplementary affidavits and held a hearing. It observed testimony from several witnesses including the complaining witness, the highest ranking police officer involved in the case, and an expert in the field of human perception and memory.

On the basis of the evidence received at the evidentiary hearing, together with it consideration of the state court record, the district court found the following essential facts:

(1) The entire episode surrounding the rape took place under very poor lighting conditions;

(2) The complaining witness did not give the police a good physical description of her assailant;

(3) During the seven-month period between the crime and her identification of Biggers, the complaining witness attended several lineups and "showups";

(4) Seven months after the crime, the complaining witness was told to come to police headquarters to "look at a suspect";

(5) The complaining witness changed her story of the "showup" between the original trial and the federal habeas hearing: At trial, she testified that she had initially identified Biggers on the basis of his voice but in the federal hearing, she testified that she identified him before he was forced to speak the words "shut up or I'll kill you" (A. 34);

(6) It was unnecessary for the police and prejudicial to Biggers for the police to use the "showup" procedure, rather than a lineup.[21]

(7) Biggers' indictment and conviction were based almost exclusively on the stationhouse identification.

On these facts, the district court found that the "show up" in this case violated the Due Process Clause. The court emphasized that there had been no serious effort to arrange a lineup, even though there was no pressing need for a speedy identification; that both parties admitted that a lineup was more reliable than a "showup"; that the crime was already seven months stale at the time of the "showup" was staged; that the complaining witness was "unable to give either an independent photographic identification of the suspect or a good physical description of her assailant" (A. 42); and that the chronic uncertainties and inherent deficiencies of the "showup" procedure were further aggravated by the witnesses'

---

[21] "[T]here is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screening of Metro Jail inmates no other efforts were made. There are several other prison facilities in the area and there is no evidence that any effort was made to screen them for subjects. The Court sees no reason why this could not have been done in order to maximize the fairness of the identification process." (A. 41, 42).

"knowledge that petitioner was thought by the police to be her assailant". (A. 42)

The court of appeals, after reviewing testimony given in both state and federal courts found no error either in the district court's findings of fact or in its application of the principles of due process[22] to the pre-trial "show up".[23]

Both counts below, therefore, properly applied the teachings of *Stovall v. Denno*, 388 U.S. 293, 302 (1967) and *Foster v. California*, 394 U.S. 440 (1969). *Stovall* makes clear that an identification procedure may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law is denied when testimony concerning the identification is introduced, as it was here, at trial. See also *Kirby v. Illinois* U.S. (1972). Such a claim must be evaluated in the light of the "totality of the surrounding circumstances" with careful consideration devoted to both the necessity for the procedures used and the likelihood that the procedures induced a misidentification.

Following *Stovall* the lower courts, while acknowledging the notorious unreliability and the innate suggestiveness of "showup" identifications,[24] have refused

---

[22] "We too have reviewed the state trial court record and the appellate record above that, as well as the somewhat different transcript developed in the testimony before the District Judge. We believe the record does not allow us to find that the conclusions of fact of the District Judge are clearly erroneous. In addition, we find no error in the District Judge's understanding of the principles of due process of law as they apply to identification proceedings prior to decision of the *Wade, Gilbert*, cases." (448 F.2d 91, 95)

[23] Judge Brooks dissented only on the ground that the district court was not authorized to grant habeas corpus relief because of this Court's 4-4 affirmance.

[24] The courts, legal scholars and experts in the field (see *e.g.*, the testimony of Dr. Irwin Pollack at (A. 89)) have recognized that

to brand as *per se* unconstitutional all "showup" confrontations. The presence of special circumstances, they have ruled, may justify an improperly conducted identification or rebut the presumption that the defendant was prejudiced by such an identification. These decisions suggest that there are several types of situations in which otherwise suggestive pre-trial identification confrontations may not deprive the suspect of due process of law. But many of the factors that have prompted the courts to validate "showups" in these other cases

---

the "show up" is the most grossly suggestive identification procedure now or ever used by the police . . . ", Wall, *Eyewitness Identification in Criminal Cases*, 28, and that its use "brings us to the threshold of an issue of fairness." *Wise v. United States*, 383 F.2d 206, 209 (D.C. Cir., 1967). See also, *Stovall v. Denno, supra*, at 302; Paul, *Identification of Accused Persons*, 12 Australian L.J. 42, 44 (1938); *Bates v. United States*, 405 F.2d 1104 (D.C. Cir., 1968).

In *United States v. Wade*, 388 U.S. 218 (1967) this Court quoted with approval Justice Frankfurter's observation that:

> "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." (*The Case of Sacco and Vanzetti* 30)

If this characterization applies to an identification by line up, where comparison and selectivity are greatest and suggestion minimal, it applies with far greater force to the "show up" in this case, where Mrs. Beamer could only accept or reject police suspicion that Archie Biggers was the rapist, and where the "show up" identification was the sole evidence of guilt. As one court has noted of showups:

> "Whatever the police actually say to the viewer it must be apparent to him that they think they have caught the villain. Doubtless a man seen in handcuffs or through the grill of a police wagon looks more like a crook than the man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicion." (*Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir.) cert. den. 395 U.S. 928 (1969)).

described *infra*, are conspicious by their absence here. The courts below were on solid ground in concluding that this particular "showup" constituted a denial of due process of law.

A. The Absence of Any "Compelling Necessity" In This Case

"Showups" have been held legally justified and constitutionally acceptable where there is an urgent need for rapid identification, and the use of fairer procedures would entail risks to important societal interests disproportionate to any prejudice that the suspect might suffer. Thus, a "showup" has been tolerated where compelling circumstances existed which rendered impossible the employment of a line up without the unacceptable sacrifice of an expeditious identification. There was, however, no necessity in this case to present Archie Biggers to Mrs. Beamer in a hastily contrived "showup", and the district court so found after hearing evidence on the question.

(1) *No Stovall Death-Bed Situation Is Presented*

The accused in *Stovall v. Denno, supra,* was identified without a line up, but due process was not violated *solely* because the victim was in danger of death. If an identification was to be made at all, "an immediate hospital confrontation was imperative" *Id.* at 302. The need for an immediate identification present in *Stovall* is completely absent here. On the contrary, Biggers was in

---

[25] See, *Stovall v. Denno, supra; Simmons v. United States*, 390 U.S. 377 (1967); *United States v. Davis*, 399 F.2d 948 (2d Cir. 1968).

police custody at the time of the identification on an unrelated–although patently illegal–charge, and was continuously available for identification. Mrs. Beamer was, and had been for seven months continuously, available to the police. Her health was unimpaired and–as the district court specifically found–no other factors required an immediate identification without a line up.

(2) *Considerations Of Fairness To The Suspect Did Not Require A "Show Up"*

It has also been held that when a suspect is arrested near the scene of a crime and soon after its commission, it is imperative that the police immediately ascertain the correctness of their selection of suspects, so that an innocent man may be expeditiously released and so that the authorities may resume their search when the real culprit is close and the trial still fresh. Accordingly, where the challenged pre-trial identification confrontation occurs proximate to the scene and time of the offense, the use of a "showup" procedure does not necessarily "diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals."[26] In *Simmons, supra,* a photographic identification was held not to exceed the bounds of due process because of the compelling necessity for a prompt identification–the perpetrators of a serious felony were still at large, and it was essential to determine expeditiously the identity of

---

[26] *Wise v. United States, supra*, at 210. See also *United States ex rel. Williams v. LaVallee*, 415 F.2d 643 (2d Cir. 1969); *United States v. Sanchez*, 422 F.2d 1198 (2d Cir. 1970); *Stewart v. United States*, 418 F.2d 1110 (D.C. Cir. 1969).

the criminals so that the police investigation could be resumed and redirected if the suspects were exonerated by the identification.

Biggers, however, was not arrested near the scene of the crime or at the approximate time of its commission. It is now conceded that there was no evidence supporting his arrest for loitering, but even the police interest behind the pretext that he was loitering did not pertain to the rape of Mrs. Beamer. Considerations of fairness to the suspect certainly did not require that he be presented to the witness in a "show up" rather than in a conventional line up.[27] Although the state claimed that a "show up" was both fairer and necessary in this case, the trial court rejected both claims after hearing evidence particularly directed towards them.

The failure to provide Biggers with the protection of a lineup in this rape case, considering his youth, the seven-month period since the crime, and all the other circumstances surrounding the case, was constitutionally inexcusable. The time lapse alone, well-known to the police, should have been sufficient to require that officials seeking an impartial, dispassionate identification hold a lineup. This is especially true because the record reveals that the Nashville Police Department recognized the superiority of the lineup to a "showup" and had held lineups in other cases. Held without any exigent or compelling circumstances, and in the face of strong reasons to provide the acknowledged protections of a lineup, Biggers' "showup" identification violated due process under the reasoning of both *Stovall v. Denno, supra*, and *Simmons v. United States, supra*.

---

[27] See *Criminal Investigation and Interrogation*, Gerber and Schroeder ed., § 22.20 (1962); *Criminal Investigations*, Jackson ed. (5th ed. 1962) at 41-42.

B. The Absence of Any External Indicia of Accuracy

In yet another series of decisions, the use of questionable identification procedures has been upheld where factors external to the confrontation strongly suggested that the witnesses' identification were accurate. The courts have attempted to evaluate the accuracy of a "showup" identification by examining several factors whose presence might substantially increase the likelihood of an accurate identification and minimize the possibility of an induced misidentification. In this case, however, the district court found that there was an intolerably great likelihood that the suggestive "showup" confrontation actually prompted the identification by Mrs. Beamer, and that independent or external factors did not verify the accuracy of her recognition sufficiently to avoid a lineup. Aside from Mrs. Beamer's identification (not supported by the testimony of her daughter, the only other witness to the crime) no other evidence pointed to guilt. Thus even a broad view of the external factors which might be considered (cf. *Clemons v. United States*, 408 F.2d 1230, 1250 (D.C. Cir. 1969) (Leventhal, J. and Burger, J., concurring)) cannot validate the "showup" in this case.

(1) *No Good or Sustained Opportunity to Observe Assailant*

The courts have generally sanctioned "showups" where the witness enjoyed an unusually good and sustained opportunity to view the perpetrators of the crime,[28] since

---

[28] Supreme Court: *Coleman v. Alabama*, 399 U.S. 1 (1970); *Simmons v. United States*, *supra*, (broad daylight and prolonged opportunity to observe perpetrator), 2d Cir: *United States ex rel. Anderson v. Mancusi*, 413 F.2d 1012 (1969), (broad daylight); *United States ex rel. Garcia v. Follette*, 417 F.2d 709 (1969); and

this sort of exposure could minimize the possibility that even a suggestive "showup" would culminate in a misidentification. In this case, of course, the evidence clearly shows that the complaining witness did not get an opportunity to obtain either a good or a prolonged view of her assailant. She had been grabbed from behind in an unlit hallway, and then taken out of the house into the night through a similarly unlit kitchen to a nearby patch of woods where the rape was committed. The events surrounding the crime lasted from 10 to 30 minutes and available indicators–Mrs. Beamer's failure to describe her assailant closely to the police and subsequent inconsistencies in her testimony–point inexorably to the conclusion that she had no clear mental impression of the man who assaulted her.

(2) *Excessive Time Lapse Before Staging the "Showup"*

The courts have also sanctioned "showups" where the witness-suspect confrontation occurred so soon after the commission of the crime that the chances of misidentification were minimal.[29] The probative value of an

---

United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (1969) (where the victim made a deliberate attempt to study the face of her attacker). 8th Cir.: *Cline v. United States*, 395 F.2d 138 (1968) (where the witness observed the maskless robbers in a well-lit room for three hours). 10th Cir.: *Hanks v. United States*, 388 F.2d 171 (1968). D.C. Cir.: *Bates v. United States, supra* (where the witness' had an excellent and prolonged opportunity to observe her assailant in a well-illuminated room); *Gregory v. United States*, 410 F.2d 1016 (1969) (well-lit room); *Macklin v. United States*, 409 F.2d 174 (1969); and *Stewart v. United States, supra*.

[29] Supreme Court: *Simmons v. United States, supra*, (photographic identification one day after crime). 2d Cir.: *United States ex rel. Anderson v. Mancusi, supra*, (one hour); *United States ex rel. Garcia v. Follette, supra*, (five weeks); *United States ex rel.*

identification made while the witnesses' memory is still fresh promotes fairness and reliability and outweighs any prejudicial suggestiveness which might otherwise inhere in the confrontation. The lengths of time held permissible ranged from a few hours to several weeks—but have apparently never extended to a period of seven months.

(3) *Absence of Independent Indications of Accuracy*

Finally, the courts have tended to uphold "showups" where the "one-on-one" confrontation was conducted after some other independent identification had been obtained from the witness (e.g., photographic identification) or after the witness gave the police an extremely accurate description of the perpetrator.[30] But here the

---

Rutherford v. Deegan, supra, (11 days). 5th Cir.: *United States v. Venere*, 416 F.2d 144 (1969). D.C. Cir.: *Bates v. United States, supra*, (30 minutes); *Gregory v. United States, supra*, (3 weeks); *Macklin v. United States, supra; Young v. United States*, 407 F.2d 720 (1969); (within minutes); *Stewart v. United States, supra*, (two hours); *Russell v. United States, supra*, (minutes); *Wise v. United States, supra*, (minutes); and *Clark v. United States*, 408 F.2d 1230 (1968), (few weeks).

[30] 2d Cir.: *United States ex rel. Anderson v. Mancusi, supra*, (accurate description); *United States ex rel. Garcia v. Follette, supra*, (suspects identified themselves to witness by threats at luncheonette showup). 4th Cir.: *United States v. Thompson*, 417 F.2d 196 (1969), (accurate description and prior photographic identification). 5th Cir.: *Crume v. Beto*, 383 F.2d 36 (1967), (witness tentatively identified defendant in a prior line up). 8th Cir.: *Cline v. United States, supra*, (witness positively identified two others as intruders, and both parties subsequently admitted their guilt). 10th Cir.: *Hanks v. United States, supra*, (previous photographic identification). D.C. cir.: *Bates v. United States, supra*, (accurate description); *Gregory v. United States, supra*, (good description); and, *Stewart v. United States, supra*, (accurate description).

district court characterized Mrs. Beamer's description as "general." There was no independent photographic identification. The only other witness to the attack, Mrs. Beamer's daughter, was unable to identify respondent.

Although identifications have been deemed constitutionally acceptable within the carefully limited contexts described above, the courts have vindicated the rights of suspects prejudiced by a pre-trial identification confrontation which was unduly suggestive and conducive to misidentification without any persuasive justification for its use. Biggers' claim in this regard is at least as strong as the one recognized by this Court in *Foster v. California*, 394 U.S. 440 (1969), where the suggestive element in the repeated confrontations staged by the authorities caused a lineup identification procedure to approximate the unreliability of a "showup." As in *Foster*, the state could have employed procedures to safeguard the fairness of the identification but failed to do so. Such safeguards were established—by expert testimony—to be more likely productive of reliable identification. Mrs. Beamer need not have been told that Biggers was a suspect. When forced to speak as a test of voice, Biggers was told to repeat the precise language, inflammatory as it was, used by the criminal. Parents and counsel were available and could have been present and a lineup could and should have been employed.

Although the state claimed that a line up would not have been fair to respondent because no prisoners were readily available who matched his general description, the district court expressly concluded there was no practical impediment to a lineup. The court pointed out that there was no need for speed and that no "concerted effort was made to produce suitable subjects." Relying in part of its knowledge of local conditions the court concluded that

no canvas was made of several nearby prison facilities. Nor did the police claim that there were not persons in custody who shared certain of respondent's traits, such as size, age and voice, in custody. Their claim was only the casuistical one that they could not find persons who combined all of these traits. But as respondent's expert witness testified, even a lineup which is far from ideal provides more check on a witness than none at all, see A. 42.

It is even dubious that Mrs. Beamer identified Biggers in court at trial. The state contends that she did; but as the district court found:

> There is considerable doubt on reading the trial record as to whether or not Mrs. Beamer made a positive in-court identification of petitioner at the time of the trial. (A. 34)

Even assuming, however, that Mrs. Beamer did make an in-court identification, that identification would be neither corroborative nor constitutionally admissible for the state has not shown—as it must—that such an in-court identification had a source independent of the questioned "showup."[32]

Opportunity to observe the alleged criminal act, has been the one factor considered most frequently by

---

[31] Biggers was in custody approximately twelve and one half hours when the "show up" was staged. Most of this period was at night. Thus, it took about four business hours for the police to "exhaust" the available opportunities for a line up. This is hardly sufficient time for the exigent circumstances doctrine of *Stovall, supra*, to be legitimately invoked.

[32] In *United States v. Wade*, 388 U.S. 218, 240 (1967), the Court said that there must be "clear and convincing evidence" that the courtroom identification had an independent origin if there had been an unconstitutional lineup proceeding.

lower courts and given the most weight in determining independent source. See Note, 55 Minnesota Law Review 779 (1971); *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 915 (2d Cir. 1970). In the present case, the district court judge found that:

> The entire episode occurred in very dim light and the rape itself occurred in moonlight. As a result, Mrs. Beamer could give only a very general description of her assailant, describing him as being fat and flabby with smooth skin, bushy hair and a youthful voice. (A. 33)

Where courts have upheld in-court identifications, there has been a much clearer prior opportunity to observe the alleged assailant. In *Coleman v. Alabama*, 399 U.S. 1 (1969), for example, this Court said that the lower court could have found that the identification by the victim was based on observation at time of the assault. The victim testified he saw one of the defendants "in the car lights while looking straight at him" and that he saw another defendant "face to face," that he "looked into his face," and "got a real good look at him." In contrast, the district court here found:

> The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime. (A. 42)[33]

---

[33]Lower court opinions frequently refer to the lighting at the time of the crime as an important consideration in determining if an in-court identification was untainted. E.G. *United States v. Terry*, 422 F.2d 704 (D.C. Cir. 1970); *United States v. Kemper*, 433 F.2d 1153 (D.C. Cir. 1970). The crime in the present case, however, occurred in "very dim light."

Additionally, lapse of time between the alleged act and the identification reduces the likelihood that the in-court identification, if made, had an independent source.[34] None of the cases that have found an independent source for an in-court identification have involved such a lengthy delay as in this case. Rather, the more typical situation involved an impermissable "showup" or lineup within a short period of time after the crime was committed.

C. Additional Grounds Supporting Relief

An additional consideration supports the grant of the writ in this case. [35] By admitting into evidence the identification of respondent obtained as a result of a pre-trial confrontation held while he was unlawfully arrested, the state violated rights guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution. Biggers was seized at a hospital where he had gone with his mother to seek treatment, although the police lacked the requisite probable cause to arrest him. The police apparently recognized their lack of probable cause, for the only charge lodged against Biggers prior to the "showup" was the admittedly "technical" accusation of

---

[34] As Judge Friendly (in *United States ex rel. Phipps v. Follette, supra*, at 915) has written:

> "Lapse of time between the crime and the confrontation is also important; the longer the interval, the greater the dangers that the initial image will have dimmed and that the second image will play a significant role. Also, a long interval between the initial observation and the trial coupled with an improper confrontation a comparatively short time before the witness appears in court enhances the danger that he may be relying on his most recent encounter."

[35] A prevailing party "may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] . . . court," *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

loitering (A. 76). The loitering charge, therefore, was merely a pretext used to hold Biggers in the absence of an adequate rationale for detention; it is clear, moreover, that the loitering charge was absolutely lacking in substance, see *Thompson v. City of Louisville*, 362 U.S. 199 (1960), inasmuch as the youth was in the company of his mother and was receiving hospital treatment at the time of arrest. Cf. *Papachistou v. City of Jacksonville*, 405 U.S. 156 (1972). Neither the baseless and unconstitutional loitering charge, nor information then available to the police concerning the rape, or any other crimes so far as the record shows, justified the warrantless arrest and detention of respondent.

In *Davis v. Mississippi*, 394 U.S. 721 (1969) this Court examined the problems associated with investigatory detention and concluded that any such detention must satisfy the strictures of the Fourth Amendment. The *Davis* Court ordered the exclusion of extremely reliable fingerprint evidence taken from a defendant who had been held without a warrant for investigation.[36] In the instant case, the illegal arrest of respondent resulted in the production of the unreliable "showup" evidence. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Certainly, the constitutional protection which was applied to the production of highly reliable evidence such as fingerprints applies with at least as much vigor to the circumstances of respondent's arrest and "showup."

---

[36]Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions . . . [F]ingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.' (395 U.S. at 95)

CONCLUSION

WHEREFORE, respondent prays that the judgment of the court below be affirmed.

Respectfully submitted,

MICHAEL MELTSNER
Columbia University Law School
435 West 116th Street
New York, New York 10027

JACK GREENBERG
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
404 James Robertson Parkway
Suite 1414, Parkway Towers
Nashville, Tennessee 37217

Attorneys for Respondent

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEIL, WARDEN *v.* BIGGERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-586. Argued October 18-19, 1972—
Decided December 6, 1972

Respondent was convicted of rape on evidence that consisted in part of testimony concerning the victim's visual and voice identification of respondent at a station-house showup that occurred seven months after the rape. The victim, who had been in the presence of her assailant a considerable time and had directly observed him indoors and under a full moon outdoors, testified that she had "no doubt" that respondent was her assailant. She had previously given the police a description of her assailant, which was confirmed by a police officer. Before the showup where she identified respondent, the victim had made no identification of others who were presented at previous showups, lineups, or through photographs. The police asserted that they used the showup technique because they had difficulty in finding for a lineup other individuals generally fitting respondent's description as given by the victim. The Tennessee Supreme Court's affirmance of the conviction was affirmed here by an equally divided Court. 390 U. S. 404. Respondent then brought a habeas corpus action in District Court. After rejecting the petitioner's contention that this Court's affirmance constituted an actual adjudication within the meaning of 28 U. S. C. § 2244 (c) and thus barred further review of the showup identification in a federal habeas corpus proceeding, the District Court, noting that a lineup is relatively more reliable than a showup, held that the confrontation here was so suggestive as to violate due process. The Court of Appeals affirmed. *Held:*

1. This Court's equally divided affirmance of respondent's state court conviction does not, under 28 U. S. C. § 2244 (c), bar further federal relief by habeas corpus, since such an affirmance merely ends the process of direct review but settles no issue of law. Pp. 2-3.

Syllabus

2. While the station-house identification may have been suggestive, under the totality of the circumstances the victim's identification of respondent was reliable and was properly allowed to go to the jury. Pp. 7–13.

448 F. 2d 91, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and STEWART, JJ., joined. MARSHALL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–586

William S. Neil, Warden, *v.* Archie Nathaniel Biggers.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 6, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station house identification of respondent by the victim. The Tennessee Supreme Court affirmed. *Biggers* v. *State*, 219 Tenn. 553, 411 S. W. 2d 696 (1967). On certiorari, the judgment of the Tennessee Supreme Court was "affirmed by an equally divided Court." *Biggers* v. *Tennessee*, 390 U. S. 404 (1968) (MR. JUSTICE MARSHALL not participating). Respondent then brought a federal habeas corpus action raising several claims. In reply, the State contended that the claims were barred by 28 U. S. C. § 2244 (c), which provides in pertinent part:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein. . . ."

The District Court held that the claims were not barred and, after a hearing, held in an unreported opinion that the station house identification procedure was so suggestive as to violate due process. The Court of Appeals affirmed. *Biggers* v. *Neil*, 448 F. 2d 91 (1971). We granted certiorari to decide whether an affirmance by an equally divided Court is an actual adjudication barring subsequent consideration on habeas corpus, and, if not, whether the identification procedure violated due process. 405 U. S. 954 (1972).

I

The intended scope of the phrase "actually adjudicated by the Supreme Court" must be determined by reference to the peculiarities of federal court jurisdiction and the context in which § 2244 (c) was enacted. Jurisdiction to hear state prisoner claims on habeas corpus was first expressly conferred on the federal courts by the Judiciary Act of 1867. Thereafter, decisions of this Court established not only that *res judicata* was inapplicable, *e. g.*, *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924); *Fay* v. *Noia*, 372 U. S. 391, 423 (1963), but also that federal courts were obliged in appropriate cases to redetermine issues of fact and federal law. By the same token, the Court developed a number of limiting principles to restrain open-ended relitigation, among them that a successive habeas corpus application raising grounds rejected in a previous application might be denied without reaching the merits. *Salinger* v. *Loisel*, *supra*, 265 U. S., at 231.

In 1948, Congress codified a version of the *Salinger* rule in 28 U. S. C. § 2244. As redesignated and amended in 1966, § 2244 (b) shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus. With this in mind, the purpose of

§ 2244 (c), also enacted in 1966, becomes clear. This subsection embodies a recognition that if this Court has "actually adjudicated" a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled. A subsequent application for habeas corpus raising the same claims would serve no valid purpose and would add unnecessarily to an already overburdened system of criminal justice.[1]

In this light, we review our cases explicating the disposition "affirmed by an equally divided Court." On what was apparently the first occasion of an equal division, *The Antelope*, 23 U. S. (10 Wheat.) 66 (1825), the Court simply affirmed on the point of division without much discussion. 23 U. S. (10 Wheat.), at 126–127. Faced with a similar division during the next Term, the Court again affirmed, Chief Justice Marshall explaining that "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting* v. *Bank of the United States*, 24 U. S. (11 Wheat.) 59, 78 (1826). As was later elaborated, in such cases it is the appellant or petitioner who asks the Court to overturn a lower court's decree.

> "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore stands in full force. It is, indeed, the settled practice in such case to enter a

[1] The legislative history adds little. The Senate Report states, cryptically, that "[t]his subsection is intended to give a conclusive presumption only to actual adjudications of Federal rights, by the Supreme Court, and not to give such a presumption to mere denials of writs of certiorari." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). We conclude from this only that Congress did not expressly address itself to the effect of an affirmance by an equally divided Court. Nor is this surprising in view of the rarity of such divided affirmances in criminal cases.

judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed." *Durant* v. *Essex Co.*, 74 U. S. (7 Wall.) 107, 112 (1868).

Nor is an affirmance by an equally divided Court entitled to precedential weight. *Ohio ex rel. Eaton* v. *Price*, 364 U. S. 263, 264 (1960). We decline to construe § 2244 (c)'s bar as extending to claims on which the judgment of a state court stands because of the absence of a majority position in this Court, and accordingly conclude that the courts below properly reached the merits.[2]

II

We proceed, then, to consider respondent's due process claim.[3] As the claim turns upon the facts, we must

---

[2] We have been aided, and are confirmed in this view, by the thoughtful opinion of Judge Mansfield in *United States ex rel. Radich* v. *Criminal Ct. of City of New York*, 459 F. 2d 745 (CA2 1972), cert. pending *sub nom. Ross* v. *Radich*, No. 71-1510.

[3] The dissent would have us decline to address the merits because the District Court, after an evidentiary hearing, found due process to have been violated, and the Court of Appeals—after reviewing the entire record—found that "the conclusions of fact of the district judge are [not] clearly erroneous." App. Pet. A-7. It is said that we should not depart from "our long established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous." *Post*, at —. This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily

first review the relevant testimony at the jury trial and at the habeas corpus hearing regarding the rape and the identification. The victim testified at trial that on the evening of January 22, 1965, a youth with a butcher knife grabbed her in the doorway to her kitchen:

"A. [H]e grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.

"Q. And there was no light in that kitchen?

"A. Not in the kitchen.

"Q. So you couldn't have seen him then?

"A. Yes, I could see him, when I looked up in his face.

"Q. In the dark?

"A. He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

"Q. You could see? No light? And you could see him and know him then?

"A. Yes." Tr. of Rec., pp. 33–34.

When the victim screamed, her 12-year-old daughter came out of her bedroom and also began to scream. The assailant directed the victim to "tell her [the daughter] to shut up, or I'll kill you both." She did so, and was then walked at knifepoint about two blocks along a rail-

---

in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be "confined" to two specific issues which we deem not controlling. Of the nine cases cited in the dissenting opinion in support of the rule of practice urged upon us, eight of them involved civil litigation in the federal system. Only one of the cases cited, *Boulden* v. *Holman*, 394 U. S. 478 (1969), involved a habeas corpus review and the Court simply held—on the basis of "an independent study of the entire record"—that the conclusion reached by the District Court and the Court of Appeals "was justified." 394 U. S., at 478.

road track, taken into a woods, and raped there. She testified that "the moon was shining brightly, full moon." After the rape, the assailant ran off, and she returned home, the whole incident having taken between 15 minutes and half an hour.

She then gave the police what the Federal District Court characterized as "only a very general description," describing him as "being fat and flabby with smooth skin, bushy hair and a youthful voice." Additionally, though not mentioned by the District Court, she testified at the habeas corpus hearing that she had described her assailant as being between 16 and 18 years old and between five feet ten inches and six feet tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. This testimony was substantially corroborated by that of a police officer who was testifying from his notes.

On several occasions over the course of the next seven months, she viewed suspects in her home or at the police station, some in lineups and others in showups, and was shown between 30 and 40 photographs. She told the police that a man pictured in one of the photographs had features similar to those of her assailant, but identified none of the suspects. On August 17, the police called her to the station to view petitioner, who was being detained on another charge. In an effort to construct a suitable lineup, the police checked the city jail and the city juvenile home. Finding no one at either place fitting petitioner's unusual physical description, they conducted a showup instead.

The showup itself consisted of two detectives walking respondent past the victim. At the victim's request, the police directed petitioner to say "shut up or I'll kill you." The testimony at trial was not altogether clear as to whether the victim first identified him and then asked that he repeat the words or made her identification after

he had spoken.[4] In any event, the victim testified that she had "no doubt" about her identification. At the habeas corpus hearing, she elaborated in response to questioning.

> "A. That I have no doubt, I mean that I am sure that when—see, when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe——
>
> "Q. You say when you first laid eyes on him, which time are you referring to?
>
> "A. When I identified him in the courthouse when I was took up to view the suspect." Pet. App., p. 127.

We must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process requirements.

III

We have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In

---

[4] At trial, one of the police officers present at the identification testified explicitly that the words were spoken after the identification. The victim testified:

"Q. What physical characteristics, if any, caused you to be able to identify him?

"A. First of all,—uh—his size,—next I could remember his voice.

"Q. What about his voice? Describe his voice to the Jury.

"A. Well, he has the voice of an immature youth—I call it an immature youth. I have teen-age boys. And that was the first thing that made me think it was the boy." Tr. of Rec., p. 17.

The colloquy continued, with the victim describing the voice and other physical characteristics. At the habeas corpus hearing, the victim and all of the police witnesses testified that a visual identification preceded the voice identification. Pet. App., pp. 80, 123, 134.

Stovall v. *Denno*, 388 U. S. 293 (1967), the Court held that the defendant could claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." 388 U. S., at 301–302. This, we held, must be determined "on the totality of the circumstances." We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hospital room, and also made an in-court identification.

Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

> "[W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384 (1968).

Again we found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

The only case to date in which this Court has found identification procedures to be violative of due process is *Foster* v. *California*, 394 U. S. 440, 442 (1969). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. We held all of the identifications inadmissible, observing that the identifications were "all but inevitable" under the circumstances. 394 U. S., at 443.

In the most recent case of *Coleman* v. *Alabama*, 399 U. S. 1 (1970), we held admissible an in-court identification by a witness who had a fleeting but "real good look" at his assailant in the headlights of a passing car. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. JUSTICE BRENNAN for four members of the Court stated that this evidence could support a finding that the in-court identification was "entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup." 399 U. S., at 5–6.

Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, *supra*, 390 U. S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for

the admissibility of testimony concerning the out-of-court identification itself.[5] It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.

What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence.[6] While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to petitioner, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may

---

[5] See *Clemons* v. *United States*, — U. S. App. D. C. —, 408 F. 2d 1230, 1250 (1968) (McGowan, J., for the court *en banc*), cert. denied, 394 U. S. 964 (1969). In the present case, there has been controversy, in our view irrelevant, over whether, as she testified at the habeas corpus hearing, the victim actually made an in-court identification. While we think it evident from the many testimonial links between her out-of-court identification and "the defendant" before her in court that the answer is "yes," we recognize that if the testimony concerning the out-of-court identification was inadmissible, the conviction must be overturned.

[6] The District Court stated:

"In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected." Pet. App., p. 42.

be available, not because in every instance the admission of evidence of such a confrontation offends due process. *Clemons* v. *United States*, — U. S. App. D. C. —, 408 F. 2d 1230, 1251 (1968) (Leventhal, J., concurring); cf. *Gilbert* v. *California*, 388 U. S. 263, 273 (1963); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall* v. *Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion.

In part, as discussed above, we think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup, the issue on which expert testimony was taken at the evidentiary hearing. It must be kept in mind also that the trial was conducted before *Stovall* and that therefore the incentive was lacking for the parties to make a record at trial of facts corroborating or undermining the identification. The testimony was addressed to the jury, and the jury apparently found the identification reliable. Some of the State's testimony at the federal evidentiary hearing

may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the state record, which itself fully corroborated the identification.

We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.[7] Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had "no doubt" that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget." Pet. App., p. 128.

There was, to be sure, a lapse of seven months between the rape and the confrontation.[8] This would be a seriously negative factor in most cases. Here, however, the

---

[7] See *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912, 915–916 (CA2) (Friendly, J.), cert. denied, 400 U. S. 908 (1970).

[8] Respondent attaches some weight to the failure of the victim's daughter to identify him. Apart from the fact that this does not bear directly on the reliability of her mother's identification, the girl was only 12 years old and had, as best we can tell, only a very brief view of the assailant from across the room.

testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go the jury.[9]

Affirmed in part, reversed in part, and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[9] Respondent's habeas corpus petition raised a number of other claims, including one challenging the legality of his detention at the time he was viewed by the victim. The courts below did not address these claims, nor do we.

SUPREME COURT OF THE UNITED STATES

No. 71–586

William S. Neil, Warden, *v.* Archie Nathaniel Biggers.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 6, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART concur, concurring in part and dissenting in part.

We granted certiorari in this case to determine whether our affirmance by an equally divided Court of respondent's state conviction constitutes an actual adjudication within the meaning of 28 U. S. C. § 2244 (c), and thus bars subsequent consideration of the same issues on federal habeas corpus. The Court holds today that such an affirmance does not bar further federal relief, and I fully concur in that aspect of the Court's opinion. Regrettably, however, the Court also addresses the merits and delves into the factual background of the case to reverse the District Court's finding, upheld by the Court of Appeals, that under the "totality of the circumstances," the pre-*Stovall* showup was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This is an unjustified departure from our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, *e. g.*, *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Faulkner* v. *Gibbs*, 338 U. S. 267, 268 (1949); *United States* v. *Dickinson*, 331 U. S. 745, 751 (1947); *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67 (1932); *United States* v. *Chemical Foundation*, 272 U. S. 1, 14 (1926); *Baker* v. *Schofield*, 243 U. S. 114, 118 (1917); *Towson* v. *Moore*, 173 U. S. 17, 24 (1899); cf. *Boulden* v. *Holman*, 394 U. S. 478, 480–481 (1969).

As the Court recognizes, a pre-*Stovall* identification obtained as a result of an unnecessarily suggestive showup may still be introduced in evidence if, under the "totality of the circumstances," the identification retains strong indicia of reliability. After an extensive hearing and careful review of the state court record, however, the District Court found that, under the circumstances of this case, there existed an intolerable risk of misidentification. Moreover, in making this determination, the court specifically found that "the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime," "the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission," and the complaining witness was unable to give "a good physical description of her assailant" to the police. Pet. App., pp. 41–42. The Court of Appeals, which conducted its own review of the record, upheld the District Court's findings in their entirety. *Biggers* v. *Neil*, 448 F. 2d 91, 95 (CA6 1971).

Although this case would seem to fall squarely within the bounds of the "two-court" rule, the Court seems to suggest that the rule is "inapplicable here" because "this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below). . . ." *Ante*, at ———, n. 3. The "two-court" rule, however, rests upon more than mere deference to the trier of fact who has a first-hand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial "time-saver," making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved.

Thus, the "two-court" rule must logically apply even where, as here, the lower courts' findings of fact are based primarily upon the state court record.

The Court argues further, however, that the rule is irrelevant here because, in its view, "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." *Ante*, at —, n. 3. I cannot agree. Even a cursory examination of the Court's opinion reveals that its concern is not limited solely to the proper application of legal principles but, rather, extends to an essentially *de novo* inquiry into such "elemental facts" as the nature of the victim's opportunity to observe the assailant and the type of description the victim gave the police at the time of the crime. And although we might reasonably disagree with the lower courts' findings as to such matters, the "two-court" rule wisely inhibits us from cavalierly substituting our own view of the facts simply because we might adopt a different construction of the evidence or resolve the ambiguities differently. On the contrary, these findings are "final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1948). The record before us is simply not susceptible to such a showing and, indeed, the State does not argue otherwise. I would therefore dismiss the writ of certiorari as improvidently granted insofar as it relates to Question 2 of the Questions Presented.